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James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

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THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL CERAMICS, )  
INC., DBA GLIDEWELL LABORATORIES, )  
  )  
  )  
PLAINTIFF/COUNTER-DEFENDANT, ) CASE NO.  
   ) SACV11-01309-DOC  
   ) (ANx)  
   )  
KEATING DENTAL ARTS, INC., )  
   )  
   )  
DEFENDANT/COUNTER-PLAINTIFF. )  
   )  
\_\_\_\_\_)

VIDEOTAPED DEPOSITION OF DAVID J. FRANKLYN

TAKEN FRIDAY, OCTOBER 12, 2012

IRVINE, CALIFORNIA

Reported by Audra E. Cramer, CSR No. 9901

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James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 VIDEOTAPED DEPOSITION OF DAVID J. FRANKLYN, TAKEN ON	1 EXHIBITS (CONTINUED)
2 BEHALF OF THE DEFENDANT/COUNTER-PLAINTIFF, AT 9:40 A.M.	2 NO. PAGE DESCRIPTION
3 FRIDAY, OCTOBER 12, 2012, AT 2040 MAIN STREET, IRVINE,	3 Exhibit 80 109 ARTICLE FROM INTERNATIONAL
4 CALIFORNIA, BEFORE AUDRA E. CRAMER, CSR NO. 9901,	JOURNAL OF BEHAVIORAL
5 PURSUANT TO NOTICE.	MEDICINE KDA-001648 THRU
6	652
7 APPEARANCES OF COUNSEL	4 Exhibit 81 111 EXCERPT FROM JOURNAL OF
8 FOR PLAINTIFF/COUNTER-DEFENDANT:	OROFACIAL PAIN KDA-002048
9 LEONARD TACHNER PLC	5 THRU KDA-002062
10 BY: LEONARD TACHNER, ESQUIRE	6 Exhibit 82 112 BRUXISM ARTICLE KDA-001657
11 17961 SKY PARK CIRCLE	THRU 001661
SUITE 38-E	7 Exhibit 83 113 BRUXISM ARTICLE KDA-001738
12 IRVINE, CALIFORNIA 92614-6364	THRU 742
(949) 752-8525	8 Exhibit 84 114 KDA-002078 THRU 086
13 ltachner@aol.com	9 Exhibit 85 117 WEB ARTICLE "THE METAL-FREE
14	PRACTICE SCAM"
15 FOR DEFENDANT/COUNTER-PLAINTIFF:	10 Exhibit 86 121 TWO-PAGE WEB PRINTOUT
KNOBBE MARTENS OLSON & BEAR LLP	"PROVEN WINNERS"
BY: LYNDY ZADRA-SYMES, ESQUIRE	11 Exhibit 87 122 THREE-PAGE WEB PRINTOUT
RUSTIN MANGUM, ESQUIRE	"ASK DR. CHRISTENSEN"
2040 MAIN STREET	12 Exhibit 88 136 ONE-PAGE PRINTOUT "ZIRA
14TH FLOOR	FULL-COCONUT ZIRCONIA"
18 IRVINE, CALIFORNIA 92614	13 Exhibit 89 139 TWO-PAGE TESS PRINTOUT
(949) 760-0404	"SUNTECH FULL ZIRCONIA"
19 ljs@kmob.com	14 Exhibit 90 147 TWO-PAGE "ZERISBRUX"
rustin.mangum@kmob.com	AD/PRINTOUT
21 ALSO PRESENT:	15 Exhibit 91 147 METAL-FREE RESTORATION
22 CHUCK GOSWITZ, VIDEOGRAPHER	GUIDE KDA-002172 THRU 173

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1 I N D E X	1 IRVINE, CALIFORNIA;
2 WITNESS	2 FRIDAY, OCTOBER 12, 2012, 9:40 a.m.
3 DAVID J. FRANKLYN	3
4 EXAMINATION PAGE	4 THE VIDEOGRAPHER: Good morning. This is Tape
MS. ZADRA-SYMES 6	5 No. 1 of the videotaped deposition of David Franklyn,
(P.M. SESSION) 104	6 taken by Defendants in the matter of James R. Glidewell
5	7 Dental Ceramics, Inc. v. Keating Dental Arts, Inc., in
E X H I B I T S	8 the United States District Court for the Central
6 NO. PAGE DESCRIPTION	9 District of California, Southern Division, Case
Exhibit 71 7 CV OF DAVID J. FRANKLYN	10 No. SACV11-01309-DOC.
7 Exhibit 15 35 BRUXZIR/GLIDEWELL LAB COLOR	11 This deposition is being held at 2040 Main
BROCHURE	12 Street, 14th Floor, in Irvine, California. Today's date
8 Exhibit 72 41 EXPERT REPORT OF DAVID J.	13 is Friday, October 12, 2012. The time on the video
FRANKLYN	14 screen is 9:40 a.m.
9 Exhibit 73 61 TWO-PAGE WEB PRINTOUT FOR	15 My name is Chuck Goswitz. The court reporter
10 BRUXER CROWN	16 is Audra Cramer. We are both with Digital Evidence
11 Exhibit 74 61 TWO-PAGE WEB PRINTOUT FOR	17 Group.
12 BRUXER CROWN	18 Will counsel please introduce themselves for
13 Exhibit 75 77 BRUXER DOC KDA-002445	19 the record.
14 Exhibit 76 79 DOCUMENT KDA-002444 AND	20 MS. ZADRA-SYMES: Linda Zadra-Symes and
DOCUMENT KDA-002799 THRU	21 Rustin Mangum for the Defendant Keating Dental Arts.
KDA-002800	22 MR. TACHNER: Leonard Tachner for the Plaintiff
16 Exhibit 77 91 TWO-PAGE CROWN AND BRIDGE	Page 3
WEB PRINTOUT	Page 5
17 Exhibit 78 104 EXCERPT FROM JOURNAL OF	
18 ORAL REHABILITATION	
19 KDA-002152 THRU 160	
20 Exhibit 79 107 CRANIO ARTICLE FROM OCTOBER	
1999 KDA-002106 THRU 118	

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1      Glidewell Laboratories. 2      THE VIDEOGRAPHER: Thank you. 3      Will the court reporter please swear in the 4      witness.  5                    DAVID J. FRANKLYN, 6      having been first duly sworn, was 7      examined and testified as follows:  8                    EXAMINATION 9 10     BY MS. ZADRA-SYMES: 11    Q. Good morning. 12    A. Good morning. 13    Q. The first question I have for you is, have you 14 ever been deposed before? 15    A. I have. 16    Q. How many times? 17    A. More than 10, less than 20. Probably 12, 18 14 times, something like that. 19    Q. Okay. I don't believe you listed 10 20 depositions in your resume. 21    A. I can supplement it for you.	1      Q. That would be great. 2      A. Okay. In the Herbalife case, the fifth one 3 down, I was deposed. In the Allergan case I was 4 deposed. In the Belvedere vodka case I was deposed. 5                    Going to the next page, ION Media Networks, I 6 believe I was deposed. Hard Rock Cafe case I was 7 deposed. Dioptics Medical Products I was deposed. 8 Bad Boy case I was deposed. The Cuties case, which is 9 near the end, the Roll group, I was deposed and testified in arbitration. 10     And I think that's it. How many does that come 11 to? 12     MR. TACHNER: Eight. 13     MS. ZADRA-SYMES: Eight. 14     THE WITNESS: Okay. 15     BY MS. ZADRA-SYMES: 16    Q. So other than that one arbitration, have you 17 ever testified at trial? 18    A. No. 19    Q. What was the nature of your representation for 20 King of Thai noodles? 21    A. Worked on trademark licensing agreements.
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1      Q. Okay. So let's start with that then. So which 2 cases have you testified in? 3      A. Well, do you have an extra copy of my CV that I 4 could look at? 5      Q. Yeah. 6      A. Thank you. 7      MS. ZADRA-SYMES: Oh, I marked on the one -- 8      THE WITNESS: Shall we switch? 9      MS. ZADRA-SYMES: Yeah, actually, can I take 10 this off and stick it on this one? 11     I just handed you what the court reporter has 12 marked as Exhibit 71. 13     (Whereupon, Exhibit 71 was marked 14 for identification.) 15     THE WITNESS: Yes, okay. Going through, if you 16 look at my page 2 and page 3 of my CV, there's a 17 representative list of clients, and I believe all or 18 most of the cases in which I've testified either by 19 deposition or trial would be listed here. So let's just 20 go through those, and I'll give you an indication. 21     Would that be okay? 22     BY MS. ZADRA-SYMES:	1      Q. So these are not all expert witness clients? 2      A. Correct. Some are consulting clients. 3      Q. Do you understand that you are here today in 4 connection with cases pending in the Central District of 5 California? 6      A. I do. 7      Q. And you have actually prepared a report in 8 connection that case; is that correct? 9      A. I have. 10     Q. Who have you spoken with at Glidewell 11 Laboratories regarding your report? 12     A. Mr. Jim Shuck. 13     Q. Anybody else? 14     A. No. 15     Q. Have you discussed your report with any 16 dentists? 17     A. No. 18     Q. Have you discussed any research for your report 19 with any dentists? 20     A. No. 21     Q. Have you discussed any research for your report 22 with any dental labs?
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1 A. No.	1 industry?
2 Q. Turning to your resume, Exhibit 71, your	2 A. Prior to this case, no.
3 undergraduate degree was obtained in what year?	3 Q. And everything you have read is listed in your
4 A. 1983.	4 report?
5 Q. And what was the undergraduate degree in?	5 A. I believe so.
6 A. Philosophy, religion and history.	6 Q. Have you ever been deposed in a case that
7 Q. Do you have any science education?	7 involves the dental industry?
8 A. No -- well, I took some classes.	8 A. I don't think so. No.
9 Q. In the undergraduate degree?	9 Q. Have you ever been a consultant for a client in
10 A. Yeah.	10 the dental industry?
11 Q. And what subjects would those be?	11 A. No.
12 A. I don't recall exactly. You're talking about	12 Q. Have you ever acted as legal counsel for a
13 1979 to 1983. But as part of the two-year general	13 client in the dental industry?
14 requirements, there was some science and some math, yes.	14 A. No.
15 Q. Okay. So any science education since that	15 Q. So I take it, then, you've never filed a
16 time?	16 trademark for a client in the dental industry?
17 A. No.	17 A. Correct.
18 Q. Then you obtained your law degree from the	18 Q. How many trademarks have you filed in the last
19 University of Michigan in 1990.	19 10 years?
20 A. Yes.	20 A. I don't file trademarks, but I've consulted
21 Q. Did you work at all between 1983 and 1990?	21 with companies in proceedings before the PTO.
22 A. Yes.	22 Q. And what do you mean by that?
Page 10	
Page 12	
1 Q. And what type of work did you have --	1 A. Well, I've consulted with companies in
2 A. I was a high school teacher educating students	2 selection of marks and also in office actions and how to
3 at a Catholic high school in Los Angeles.	3 respond to office actions. I've consulted with clients
4 Q. And what did you teach?	4 with inter partes proceedings. I have a client now that
5 A. History and literature.	5 has finished an inter partes proceeding in the PTO
6 Q. Have you ever taught any science classes?	6 involving genericism, and I've consulted with them
7 A. No.	7 extensively. And other priority issues, other issues
8 Q. Have you ever written any articles in	8 related to oppositions and cancellations.
9 connection with a science subject?	9 Q. And you mentioned one case. I assume by
10 A. No.	10 "inter partes in the PTO," you mean an opposition or
11 Q. Have you ever written any articles focused on	11 cancellation for the trademark --
12 the dental industry?	12 A. An opposition, trial and appeal board.
13 A. No.	13 I'm sorry. I'll --
14 Q. Have you ever read any articles focused on the	14 Q. But it's an opposition --
15 dental industry?	15 A. -- wait till you finish.
16 A. Yes.	16 Q. It's an opposition before the --
17 Q. Okay. What have you read?	17 A. Yes.
18 A. Well, the articles that are listed in my	18 Q. -- trademark trial and appeal board?
19 report. I'd have to look at my report. In preparation	19 A. Uh-huh.
20 for here.	20 Q. What's the name of the mark?
21 Q. So other than what's listed in your report,	21 A. Paveway, P-a-v-e-w-a-y.
22 you've never read any articles related to the dental	22 Q. And who is your client in that case?
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<p>1 A. Raytheon. 2 Q. Have you consulted with any other clients 3 involving genericness in the trademark trial and appeal 4 board? 5 A. Let me look. 6 It came up in a case against Google wherein 7 somebody was alleging that "Google" had become generic 8 because people say, "I'm going to Google somebody," even 9 if they mean on Yahoo. 10 Q. So which case was that? 11 A. That was -- I'm trying to see if it's on here 12 or if the client's on here. I'll have to go back and 13 look and see if it's on here. There is a case, Silvers, 14 against Google, but I don't think it came up in that 15 case. It came up in a different case where the 16 plaintiff's mark was googlegear.com. 17 Q. Who was your client in that case? 18 A. googlegear.com. 19 Other than that, I'm just looking at these to 20 see if any of these involved genericness either at the 21 PTO or in litigation. I'd have to kind of go -- well, 22 Botox. Botox' mark was claimed to be generic. I gave</p>	<p>1 of the fact that the patent lawyers who got the plant 2 patents used, at least on some occasions, the client's 3 mark, Prima, as a varietal name in the plant patent 4 applications. The argument was made -- when they went 5 and sued somebody, the defendant said, "Well, your mark 6 is generic," and that was litigated. 7 Q. Where was that litigated? 8 A. I think in the -- well, I got involved in the 9 case after that, but the underlying genericness issue 10 was litigated, I think, in the Central District in 11 federal court here in California. 12 Q. And who was your client in that case? 13 A. My client is still, as we speak, Gerawan Farms, 14 who's listed here, who's the owner of the Prima mark. 15 I'm just looking through here to see if any of 16 these other ones involved genericness. 17 Well, as I sit here today, that's my best 18 recollection of the cases that I've been involved in 19 that have involved -- that have included a genericness 20 issue. 21 Q. Okay. So the Herbalife case that you were 22 deposed in, what was the issue in that case?</p>
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1 A. That case is still going on right now. The  
2 main issue is whether Reed Smith in New York, trademark  
3 lawyers, committed malpractice in a variety of advice --  
4 pieces of advice that they gave to the then licensee of  
5 the Belvedere vodka trademark during a time when it was  
6 being purchased -- the license was being purchased by  
7 Moët Hennessy in Paris.

8 The advice had to do -- without violating any  
9 sort of confidentiality issues -- with whether they  
10 could get out of the license or they could challenge the  
11 attempt by the licensor, which was a winery in Napa  
12 which had prior rights in the Belvedere mark for wine --  
13 whether they could challenge the attempted licensing of  
14 it in a collateral market for gin. And a series of  
15 events took place which ended up costing the parties  
16 a lot of money because of the advice that was given.

17 Q. And that's pending in Central District of  
18 California.

19 A. No. That case, the Belvedere vodka case, is in  
20 state court in New York City, I believe, yeah.

21 Q. And then you mentioned that you were deposed in  
22 ION Media Networks.

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1 overstated their description of goods and services.  
2 There were a lot of issues, but trademark -- there  
3 was -- I do not believe there was a genericness issue in  
4 that case.

5 Q. Okay. And then you mentioned you were deposed  
6 in Hard Rock Cafe. Where was that case pending?

7 A. That case was pending here in state court in  
8 Los Angeles.

9 Q. And did that involve a trademark genericness or  
10 likelihood of confusion issue?

11 A. No, I don't think so.

12 Q. Then you mentioned you were deposed in Diopti;  
13 is that right? CS Medical Products.

14 A. Dioptic.

15 Q. Dioptic.

16 A. Dioptics.

17 Q. Medical products.

18 A. Yes. That -- I think that was in the Northern  
19 District of California, uh-huh. I'd have to go back and  
20 look. That's 10 years ago. I know I was deposed in  
21 San Francisco, but I'm forgetting -- and it was in  
22 federal court, either down here or up there. I just

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1 A. Yes.

2 Q. Where was that case pending?

3 A. That was here in Los Angeles in federal court.  
4 That was a case involving the trademark ION, I-O-N, and  
5 it was -- I was an expert for the defendant ION Media  
6 Networks, which I believe now is out of business, but it  
7 was a rather large cable television company. They were  
8 sued by a small company that had prior rights in the  
9 word "ion" in a registered trademark for online  
10 magazines, and they had a bit of a website where you  
11 could get some information about a variety of things.

12 Honestly, it was a linking farm, but one of the  
13 things they said they were going to do is stream  
14 television online. So that was the allegation, that  
15 there was confusion because ION Media Networks, an  
16 offline company, was related to television.

17 Q. So the main trademark issue was likelihood of  
18 confusion?

19 A. It was likelihood of confusion. It was -- I  
20 think there was some priority issues. There were issues  
21 having to do with the scope of Positive Ions' federal  
22 registration for the word "ion," whether they had

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1 don't recall.

2 Q. Do you recall whether it involved a genericness  
3 issue?

4 A. No, it involved likelihood of confusion over  
5 the mark -- oh, hang on a second -- Encor, E-n-c-o-r,  
6 for either -- one party had it for sort of post-cataract  
7 surgery sunglasses, and the other party was using it for  
8 contact lenses, and there were issues about the strength  
9 of the mark and about confusion and about whether the  
10 markets were overlapping between the parties, marketing  
11 channels.

12 Q. Okay. The next case you mentioned is Bad Boy,  
13 Inc., that you were deposed in.

14 A. Yes.

15 Q. And where was that case pending?

16 A. Southern District of Florida, I believe.

17 Q. Was the issue of genericness involved in that  
18 case?

19 A. Oh, goodness. I'd have to go back and look.  
20 The mark is Bad Boy for clothing and for power drinks,  
21 and there were issues regarding the validity of the  
22 mark, the plaintiff's mark, but I don't believe that the

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1 validity issues turned on genericness. 2 Q. And who was your client, plaintiff or 3 defendant? 4 A. I was in that case working for the plaintiff. 5 Q. The next one you mentioned you testified in is 6 the Roll group. 7 A. Yes. 8 Q. And where was that case pending? 9 A. This arbitration was -- 10 Q. I'm sorry. Arbitration. 11 A. -- was this summer in Bakersfield, California. 12 I think it was -- I testified in June of this year in 13 Bakersfield. I was deposed probably in May. Might be 14 off by a few weeks either way, but, you know, late 15 spring, early summer. 16 Q. Okay. And was the issue of genericness 17 discussed in that case? 18 A. Yes. 19 Q. Who was your client, the plaintiff or 20 defendant? 21 A. Well, they had so cross-sued each other for 22 everything, they were both plaintiffs and both	1 A. I don't think I've published a specific article 2 published on that. I've published many articles on 3 trademark law. I've studied trademark genericness quite 4 a bit. I don't think, if you look at my articles, 5 either pending or published, any of them are focused 6 primarily on the issue of genericness. 7 Q. Have you published any articles on the issue of 8 trademark likelihood of confusion? 9 A. I have discussed likelihood of confusion in 10 several of my articles. 11 Q. Which ones are those? 12 A. Let me see. I think -- you don't have on this 13 resume -- on this CV the most recent one that is coming 14 out, which talks about confusion quite a bit. Let me 15 tell you that one and tell you how you can find it. 16 It's called "Trademarks as Keywords: Much Ado 17 About Something?" and it is forthcoming in the Harvard 18 Journal of Law & Technology in spring of 2013. It is 19 posted on the Internet on the Social Science Research 20 Network, SSRN. If you Google my name and that title, 21 it'll come up within three or four hits, and you can 22 read it and download it. And it discusses likelihood of
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1 defendants, and I don't remember if -- my client was 2 Paramount Citrus. The other party was Sun Pacific. 3 Paramount Citrus is owned by the Roll group, which also 4 owns a variety of other companies, such as Fiji water, 5 and they're located here in the L.A. area. I just don't 6 remember who initiated this particular arbitration, 7 but -- yeah. 8 And the arbitration is completely confidential 9 and sealed, and so I have to be circumspect about how 10 much I say about what's involved. 11 Q. Okay. Were you representing the party 12 asserting genericness? 13 A. Neither party was asserting genericness, but 14 genericness was an issue for which testimony was needed. 15 Q. And that was the basis of your testimony? 16 A. Well, my testimony covered many things. 17 Q. Including genericness? 18 A. Yes. But I really can't say more than that. 19 It's not a public document. There's no public documents 20 on that case. 21 Q. Have you published any articles focused on the 22 subject of trademark genericness?	1 confusion on trademarks on the Internet in some detail. 2 Q. Is there a reason why it wasn't listed on your 3 resume? 4 A. Yes. Because at the time I gave this resume to 5 counsel, it hadn't been accepted for publication. It 6 was subsequently accepted for publication, and it is 7 listed in a sense where I say, third article under 8 Publications, "Empirical Study of Trademarks as 9 Keywords: Confusion, Dilution and Diversion. Multiscale 10 empirical research under way in Europe and U.S." Once 11 it matured and became accepted, we changed the title, 12 and that's why it's -- it's referenced here as a 13 research study that was pretty mature, about ready to go 14 out, but now it's a paper. 15 Q. The title changed, basically. 16 A. Yes, the title changed. 17 Q. Have you reviewed Glidewell's marketing 18 materials that have published. Not on their website, 19 but their actual -- 20 A. I believe I have, yes. 21 Q. Okay. We'll go through those. 22 Do you know what a PFM is?
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1 A. Yes. 2 Q. What is it? 3 A. Give me one second. Okay? 4 It is a porcelain-fused-to-metal crown. 5 Q. Is that a generic term? 6 A. I don't know. 7 Q. Do you know what a full-cast gold crown is? 8 A. I think it's what it sounds like: It's a 9 full-cast gold crown. 10 Q. Is that a generic term? 11 A. I don't know. I haven't given that 12 consideration. I would want to do an awful lot more 13 looking into each of these before giving an opinion on 14 one of these things. 15 Q. Have you heard of an all-ceramic crown? 16 A. I have, yes. 17 Q. Is that a generic term? 18 A. Yes. 19 Q. Have you heard of a full zirconia crown? 20 A. Yes. 21 Q. Is that a generic term? 22 A. Well, that's actually something that I've given	1 bit down on a piece of nutshell in mole enchiladas in 2 Birmingham, California, and my tooth cracked. My 3 dentist said, "We're going to shave it down and put on a 4 crown," and I think it's a zirconia crown. So I got to 5 look at it and hold it -- and that was before this 6 litigation -- and see it, and there was a temporary one 7 put in place until the full one could be put in place. 8 Then after that after, of course, when I got 9 hired here, I started to have conversations with 10 Attorney Tachner about the different types of crowns and 11 educated myself, and to read on the Internet and educate 12 myself, and talked to Mr. Shuck, I believe it is, and 13 educated myself. So I have personal experience and then 14 investigatorial experience about what a crown is. 15 Q. When did you have your crown fitted? 16 A. Two years ago? Year and a half ago? 17 Q. Do you know who manufactured the crown? 18 A. No. 19 Q. Did your dentist tell who you manufactured it? 20 A. No. 21 Q. Do you know for a fact that it was a full 22 zirconia crown?
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1 consideration to in this litigation, and I think it is, 2 yes. 3 Q. Is "full zirconia" a generic term? 4 A. I don't know. It depends on what it's used 5 for. 6 Q. If it's used in connection with dental crowns, 7 would it be generic? 8 A. I don't know. I would have to look at it, the 9 context and the way in which it's used. 10 Q. If it's used in connection with dental crowns, 11 to describe a dental crown, would it be generic? 12 A. It could be, might be. 13 Q. What is a dental crown? 14 A. A dental crown is a piece of man-made material 15 that is sculpted and shaped out of some type of 16 substance, which different substances are used to put 17 basically a cap on a tooth that has been injured in some 18 way and to crown it so that it can be used as a 19 functional tooth. 20 Q. And how do you know that? 21 A. Well, I know it from personal experience and 22 from because I have one in my mouth that I got when I	1 A. I remember him using the word "zirconia." 2 Q. Do you know if he used "full zirconia"? 3 A. I'm not sure. 4 Q. So you don't know for a fact whether you have a 5 full zirconia crown or not. 6 A. I do not. 7 Can you tell by looking if we stop the tape for 8 a minute? 9 Q. No. I don't need to look. 10 A. Okay. 11 Q. So prior to this case, being retained in 12 connection with this case by Glidewell, did you have any 13 other experience with dental crowns other than your own 14 personal experience? 15 A. I think my father has dental crowns, my mother 16 has dental crowns. Other than that kind of personal 17 experience, no. No professional experience. 18 Q. When you say that your mother and father having 19 a dental crown is personal experience, do you know what type of dental crown they have? 20 A. No. 21 Q. You don't know whether they were fitted with
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<p>1 zirconia crowns or not?</p> <p>2 A. I have never asked them. I will after today.</p> <p>3 Q. What's the primary indication for a zirconia</p> <p>4 crown?</p> <p>5 A. My understanding is that -- well, do you mean</p> <p>6 full zirconia crown?</p> <p>7 Q. Any zirconia crown.</p> <p>8 A. My understanding is that zirconia is an</p> <p>9 extra-strong material and that it should be used and is</p> <p>10 used when strength is particularly at issue. And there</p> <p>11 could be various reasons for that, why a patient might</p> <p>12 need a stronger crown than another patient.</p> <p>13 Q. And how do you know that?</p> <p>14 A. Speaking -- doing investigation in this case on</p> <p>15 the Internet, reading, reading the articles.</p> <p>16 Q. Everything that is referred to in your report?</p> <p>17 A. I believe it's all there. If -- now they can</p> <p>18 make a supplemental distribution to you.</p> <p>19 Q. Well, if there isn't anything referenced in</p> <p>20 your report, I'd like you to tell me what it is.</p> <p>21 A. I'd have to go back and look.</p> <p>22 Q. Okay. Well, we'll get to your report shortly.</p>	<p>1 prior to this case?</p> <p>2 A. No.</p> <p>3 Q. Had you had any contact with Glidewell's</p> <p>4 directors prior to this case?</p> <p>5 BY MS. ZADRA-SYMES:</p> <p>6 Q. You referenced full zirconia -- you asked me</p> <p>7 the question, actually, did I mean a zirconia crown or</p> <p>8 full zirconia crown.</p> <p>9 What's the difference, as far as you're aware,</p> <p>10 between a full zirconia crown and a regular zirconia</p> <p>11 crown.</p> <p>12 A. Well, it's my understanding that zirconia has</p> <p>13 been used or historically was used as part of a base for</p> <p>14 a crown prior to the development of the technology to</p> <p>15 the point where it could be used as a full zirconia</p> <p>16 crown. So a zirconia crown may have been used as a base</p> <p>17 at one point in time and then had an overlay of ceramic</p> <p>18 material for esthetic reasons, and I guess that would be</p> <p>19 not a full zirconia crown, a partial zirconia crown in</p> <p>20 terms of the makeup of the material.</p> <p>21 Q. Are you familiar with the term "all-zirconia</p> <p>22 crown"?</p>
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1        Oh, blanks. Okay. Blanks of zirconia 2 material? 3        A. Yes. 4        Q. How many competitors does Glidewell have? 5        A. In which market? 6        Q. For its full zirconia crowns. 7        A. My understanding is that there are many labs in 8 the United States, small labs that -- although Glidewell 9 appears to be the largest single lab for making crowns, 10 full zirconia crowns, there are many, many small labs 11 that make them. Some of them are authorized labs that 12 it has a relationship with, and some of them are not. 13        So I think the number of competitors in terms 14 of labs, independent labs, is rather large. I am not 15 sure of the size, but I am under the understanding that 16 Glidewell makes maybe 5 percent or 10 -- something 17 between 5 and 10 percent of full zirconia crowns in the 18 United States, and therefore, many other labs make the 19 rest. 20        MS. ZADRA-SYMES: Can we go off the record for 21 just a second, please. 22        THE VIDEOGRAPHER: Off the record at 10:19 a.m.	1        A. Because I've been told that it is. 2        Q. Who told you that? 3        A. I think Mr. Shuck told me that, that "bruxer" 4 is used slang to refer to a person with bruxism. 5        Q. So other than Mr. Shuck telling you that, you 6 have no other independent knowledge of it. 7        A. I've seen it used on the Internet during my 8 Internet searches. I've seen the word "bruxer" used, 9 apparently to have this meaning. 10        The reason why I pause is because of your use 11 of the word "slang." 12        Q. Actually, you used it many times in your 13 report, so that's why I'm asking you. So I'm referring 14 to your use of the word "slang." 15        A. Well, thank you. That helps me. 16        You mean by "slang" what I mean by "slang"? 17        Q. Yes, exactly. 18        A. Oh, okay. So do you want me to elaborate on 19 that or not? 20        Q. I'm asking you if the word bruxer in these 21 Glidewell marketing materials is a slang use of the word 22 "bruxer."
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1        (Recess taken.) 2        THE VIDEOGRAPHER: Back on the record at 3 10:19 a.m. 4        MS. ZADRA-SYMES: I'm going to hand you what's 5 previously been marked as Exhibit 15. 6        (Whereupon, Exhibit 15 was marked 7 for identification.) 8 BY MS. ZADRA-SYMES: 9        Q. Have you seen that before? 10        A. I believe so. 11        Q. Since I only have one copy of it as it's a 12 prior exhibit, can you please read the first bullet 13 point under the photographs? 14        A. Do you mean the photographs on the left side? 15        Q. Photographs on the left side. 16        A. The first bullet point says, "Ideal for bruxers 17 who have destroyed natural teeth or previous dental 18 restorations." 19        Q. Is that a slang use of the term "bruxer"? 20        A. Well, you know, I am under the impression that 21 it is. 22        Q. And why is that?	1        A. My understanding is that it is. 2        Q. And your basis for that understanding is your 3 discussion with Mr. Shuck? 4        A. And my investigation on the Internet. 5        Q. Okay. And when you saw it on the Internet, did 6 you see it in italics or quotes to indicate that it was 7 a slang term? 8        A. I don't know that slang terms are always put in 9 italics or quotes. 10        Q. So if the term is used by dentists in technical 11 scientific journals, would that make it a slang term? 12        A. It may mean that it's made its way from slang 13 into, you know, a more formal understanding in usage. 14        Q. Is it your understanding that Mr. Shuck is a 15 dentist? 16        A. No. 17        Q. What's your understanding of his professional 18 background? 19        A. He's, I think, Vice President of Sales for 20 Glidewell. 21        Q. Do you know if he has any dentist training? 22        A. I think he talks to dentists in his company all
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1 the time.	1 Q. And how are they labeled?
2 Q. Did you speak to a Dr. Michael DiTolla at all?	2 A. Well, it's my understanding that it says
3 A. No. I spoke with Mr. Shuck about Dr. D.	3 "BruxZir" on it, like this.
4 Q. Have you reviewed any videos in which	4 Q. So as it's shown on Exhibit 15?
5 Dr. DiTolla is promoting the Glidewell products?	5 A. Yes.
6 A. I'd have to go back and look and see.	6 Q. So by "BruxZir," you're referring to the term
7 Q. But you don't recall if you --	7 that's in the top left-hand corner of Exhibit 15?
8 A. I don't recall right as I sit here if I	8 A. Their trademark is pronounced, as I understand
9 reviewed those particular videos.	9 it, in Europe brux-ZEER [phonetic], and pronounced by
10 Q. Have you seen the term "bruxer" referenced	10 many people in the United States as brux-ZER [phonetic],
11 anywhere as a slang term in a dictionary?	11 and occasionally apparently pronounced as BRUX-er
12 A. Well, usually a dictionary wouldn't reference	12 [phonetic], with a softer Z.
13 it as a slang term. It might -- it may or it may not.	13 Q. Is it your understanding that European
14 I would have to look at that. Usually by the time it's	14 pronunciation is relevant to a U.S. case?
15 made its way into a dictionary, it's sort of considered	15 A. Well, maybe some people in the United States
16 not slang anymore.	16 pronounce it brux-ZEER too.
17 Q. Are you aware that Glidewell has admitted in	17 Q. Are you aware of anybody who does?
18 this case that the term "bruxer" is a generic term for	18 A. I haven't talked to anybody who pronounces it
19 a person who suffers from bruxism?	19 brux-ZEER in the United States. When I first saw it,
20 A. You mean have I seen a document that says that?	20 that's how I pronounced it in my head.
21 Q. Are you aware that in this case Glidewell has	21 Q. But you had no experience in dental industry.
22 admitted that the term "bruxer" is a generic term for a	22 A. That is true.

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1 person who suffers from bruxism?	1 Q. How did Mr. Shuck pronounce it?
2 A. No.	2 A. Brux-ZER.
3 Q. Are you aware that in this case Glidewell has	3 Q. And how does Dr. DiTolla pronounce it?
4 admitted that the term "to brux" is a verb?	4 A. I'm not sure.
5 A. Not specifically.	5 Q. How is it pronounced in Glidewell's marketing
6 Q. Is it your opinion that the term "bruxer" is	6 videos on Glidewell's websites?
7 not generic for a person who suffers from bruxism?	7 A. I think sometimes it's pronounced brux-ZER, and
8 A. My opinion is that it is descriptive of a	8 sometimes it's pronounced BRUX-er.
9 person who suffers from bruxism.	9 Q. Is it your position that, in order to be
10 Q. So your opinion is it's not generic for a	10 considered generic, a term has to appear in a trademark
11 person who suffers from bruxism?	11 office application and registration search?
12 A. It may be. It may be.	12 A. No.
13 Q. And are you familiar with the term "to brux" as	13 MS. ZADRA-SYMES: So can we just take five
14 a verb?	14 minutes, and then we'll get straight into your report?
15 A. Yes.	15 THE WITNESS: Sure.
16 Q. How did you become familiar with that?	16 THE VIDEOGRAPHER: Off the record at 10:28 a.m.
17 A. In my work on this case.	17 (Recess taken.)
18 Q. Have you reviewed any samples of Glidewell's	18 THE VIDEOGRAPHER: Back on the record at
19 products in connection with this case?	19 10:35 a.m.
20 A. Yes.	20 MS. ZADRA-SYMES: So I'm going to hand you what
21 Q. And what did you review?	21 the court reporter has marked as Exhibit 72.
22 A. Crowns and the boxes that they come in.	22 (Whereupon, Exhibit 72 was marked

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1 for identification.) 2 BY MS. ZADRA-SYMES: 3 Q. What is that document? 4 A. "Expert Report of David J. Franklyn." 5 Q. And do you recognize it? 6 A. I do. 7 Q. Is this in fact the report that you have 8 submitted in connection with this case? 9 A. Yes. 10 Q. On the signature page, is that your signature? 11 A. It is. 12 Q. And it was signed on September 15, 2012? 13 A. Yes, it was signed on September 15, 2012. I 14 think that's right. 15 Q. Now, in the appendix there's a curriculum 16 vitae, or resume. 17 A. Yes. 18 Q. Does this have any substantive difference than 19 the one that we already looked at earlier today? 20 A. I don't know. I don't think so. Looks like 21 the only difference is that it's double-spaced. 22 Q. Just looking at the top of page 22, there's a	1 Q. How long have you been a professor? 2 A. Since 1996. 3 Q. So since 1996 you haven't had a private client 4 practice as an attorney; is that correct? 5 A. That's correct. 6 Q. Now in, paragraph 3 of your report -- 7 A. Yes? 8 Q. -- you say, "I was retained in this matter by 9 counsel for the Plaintiff, Glidewell Laboratories, to 10 render opinions as to whether (1) Plaintiff's registered 11 mark 'BruxZir' is predominantly seen as a generic name 12 for the service of making solid zirconia dental crowns 13 and bridges or from the material from which those crowns 14 and/or bridges are made by relevant consumers in the 15 relevant markets or submarkets in the United States." 16 And I'll stop there before we get to point 17 No. 2. Okay? 18 What did you mean by "predominantly"?
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1 paragraph that says, "I have written expert reports, 2 been deposed, drafted briefs, designed surveys and filed 3 trademark applications." 4 I believe you testified earlier that you don't 5 file trademark applications; is that correct? 6 A. I don't generally file trademark applications. 7 I may have filed a trademark application in the 8 King of Thai noodle case. 9 Q. Any others? 10 A. I'd have to go back and look. I don't think 11 so, but I have advised clients on filing them, sometimes 12 extensively advised them on [inaudible mumbling]. 13 Q. Is there a reason -- 14 A. I think if you search the USPTO database and 15 look for "Franklyn" and see how many trademarks he's 16 filed, I think the only file that's going to come up 17 with my name on it probably is King of Thai noodle. 18 Q. Is there a reason why you don't file trademark 19 applications? 20 A. I'm too busy being a professor and occasional 21 expert witness. I just decided not to go into that 22 business.	1 A. I looked at what I told you I did in my 2 report: on the Internet, I looked at filings of the 3 USPTO, and I talked to Mr. Shuck about the relevant 4 market. 5 Q. But you didn't talk to anybody in the relevant 6 market? 7 A. I think Mr. Shuck is in the relevant market. 8 Q. Other than Mr. Shuck, did you talk to anybody 9 else? 10 A. No. 11 Q. In this paragraph you didn't reference the 12 dental crowns themselves. Were you retained to give an 13 opinion as to whether Plaintiff's registered mark 14 BruxZir is seen as a generic name for the dental crowns 15 themselves? 16 A. Yes. I meant that. When I talk about the 17 service of making them, the material from which they're 18 made and the resulting product. The service of making 19 them, and then obviously that results in the dental 20 crown itself. 21 Q. Okay. 22 A. I did not intend by the use of the phrase
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1 "service of making them" to exclude from my opinion the 2 resulting product.  3 Q. In this Point No. 1 in paragraph 3 you 4 reference the relevant consumers. Who are the relevant 5 consumers?  6 A. I believe I state that in a further section of 7 my report. If you'll give me a moment so that I make 8 sure I revisit that.  9 On page 11 -- would you like me to read it? 10 Q. No. I actually -- without looking at your 11 report on page 11, you didn't know who the relevant 12 consumers were? 13 A. Oh, no, I know who the relevant consumers are. 14 Q. Okay. 15 A. I just don't want to be tricked by you. 16 Q. I don't trick people. 17 A. No, I can tell. You're a very honest attorney. 18 But I have done this before, and if I use a word that's 19 slightly than I used later on page 11, somebody will 20 say, possibly, "Well, why did you just say it different 21 than the way you said it on page 11?" So I asked as a 22 courtesy that I may look at it.	1 (The reporter noted that the 2 witness was writing on the exhibits 3 being marked for the record.)  4 THE WITNESS: Did I write on it? Oh, I did, on 5 Exhibit 3.  6 I won't write on your exhibits. I won't write 7 on your exhibits again. 8 MS. ZADRA-SYMES: That's okay. But that is the 9 exhibit now, for the record, that has your handwriting in it.  11 THE WITNESS: Yes. 12 MS. ZADRA-SYMES: That's fine.  13 BY MS. ZADRA-SYMES: 14 Q. Then turning to paragraph 5 of your report, you 15 list documents that you were provided by counsel for 16 Glidewell Laboratories. 17 A. Yes. 18 Q. Other than what's listed there, have you 19 reviewed anything else that was provided to you by 20 counsel for Glidewell Laboratories? 21 A. No, not other than the actual crowns that I looked at.
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1 Q. Of course. 2 A. Okay? 3 Q. Where on page 11 are you looking? 4 A. Paragraph 11. 5 Q. And paragraph 11 says, "The relevant consumers 6 for restorations are dentists for Glidewell's fabricated 7 crowns and approved labs for materials." 8 A. Yes. 9 Q. Are there any other relevant consumers that are 10 at issue in this case? 11 A. Well, I suppose it could be the case that the 12 relevant consumers include the end user patients and how 13 they see this mark and if they're exposed to it by 14 dentists who talk to them about it, and if they are 15 exposed to it in a way that has branding significance. 16 But I think that, based on my review of the record and 17 of the other searches that I did, the consumers in the 18 relevant market in the first instance and the primary 19 instance are the dentists, the dental labs -- yeah. 20 Q. So dentists and dental labs? 21 A. Yes, uh-huh. 22 Q. Okay.	1 Q. And which crowns did you look at? 2 A. I'd have to go back and look to see which ones 3 they were. I looked at crowns that Mr. Tachner showed 4 me. 5 Q. Were they all manufactured by Glidewell? 6 A. I don't believe so. 7 Q. Do you know who the other manufacturers were? 8 THE WITNESS: Was there a crown -- well, I'll 9 have to confirm with him and clarify that, yeah. 10 BY MS. ZADRA-SYMES: 11 Q. Okay. Because everything that you reviewed in 12 connection with this report, we're entitled to know 13 about. 14 A. Of course. 15 Q. So I'd like to know what brands of products you 16 looked at -- 17 A. I will provide that to you in writing. 18 Q. Well, for the purposes of this deposition, just 19 tell me in the deposition -- 20 A. Well, of course. But I need to refresh my recollection. 22 MR. TACHNER: I could tell you if you'd like so
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1 we could just -- 2 MS. ZADRA-SYMES: No, he needs to testify -- 3 THE WITNESS: I need to say it. 4 MS. ZADRA-SYMES: Yeah. 5 THE WITNESS: Yeah, so why don't do I that 6 either later today -- 7 MS. ZADRA-SYMES: That would be fine. 8 THE WITNESS: -- if we could revisit it on the 9 record, make it easier. 10 BY MS. ZADRA-SYMES: 11 Q. So other than those samples and the documents 12 listed in paragraph 5 here, are there any other 13 materials that you've reviewed that were provided to you 14 by Glidewell or its counsel? 15 A. I don't believe so, but I would want to go 16 ahead and double-check that as well for you. 17 Q. Okay. Thank you. 18 A. Because I did have a meeting with counsel after 19 I wrote this report, but I don't think that anything we 20 went over was new that I hadn't seen before, but I would 21 like to double-check that to be especially accurate for 22 you.	1 A. Yes? 2 Q. -- are you referencing conducted by 3 Brendan Way? 4 A. Yes. 5 Q. Did anybody else have any involvement in 6 conducting searches for you? 7 A. No. 8 Q. Paragraph 6(a) -- well, actually, before that 9 question, have you produced all the results of your 10 searches in connection with this case to us? 11 A. I think so. I believe the answer to that is 12 yes, through the -- electronically, uh-huh. 13 Q. And that would be the electronic production 14 that we received on Wednesday night this week? 15 A. Yes. 16 Q. Then in 6(a) you say, "I visited and reviewed 17 the websites of Plaintiff and Defendant on several 18 occasions between August 15, 2012, and September 15, 19 2012." 20 A. Yes. 21 Q. Have you reviewed them at any other time? 22 A. No.
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1 Q. Other than Mr. Shuck and Mr. Tachner, you 2 haven't met with anybody else in connection with this 3 case; is that correct? 4 A. Met with anybody else, anywhere? 5 Q. In connection with this case. In connection 6 with your report in this case. 7 A. Yes, I have. 8 Q. Okay. Who else have you met with? 9 A. My research assistant. 10 Q. And who is that? 11 A. His name is Brendan Way, W-a-y, who helped 12 perform research for me in this case. 13 Q. Anybody else? 14 A. No. 15 Q. Then turning to paragraph 6, you say, "In 16 addition to reviewing the documents that are listed in 17 paragraph 5, I conducted or caused to be conducted under 18 my supervision the following searches of the USPTO 19 databases labs and on the Internet." 20 A. Yes. 21 Q. So when you reference "caused to be 22 conducted" --	1 Q. When you reviewed the Plaintiff's website did 2 you look at the promotional videos on the website? 3 A. Uh-huh. 4 Q. You did? Okay. 5 A. Uh-huh. 6 Q. So you remember now doing that? 7 A. I looked at some of them. I don't remember, 8 you know, extensively how much I looked at all of the 9 promotional videos. 10 Q. Do you recall looking at promotional videos 11 where Dr. DiTolla is speaking about the BruxZir product? 12 A. I told, I think, earlier, that I did remember 13 looking at that. Didn't I say that, or no? 14 Q. I asked you how you pronounced it on -- 15 A. Oh, that I don't recall. Yeah, that I don't 16 recall. That was a different question. 17 Q. And in paragraph 6(b) you say, "I conducted 18 Internet searches for 'brux,' 'bruxer,' 'bruxism,' 19 'BruxZir,' 'BruxZir crown,' 'bruxing,' 'Zir,' 'zirconia' 20 and 'solid zirconia' and 'zirconia crown' between 21 August 15 and September 15." 22 Have you produced all those search results to
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1 us? 2 A. Well, I don't know that I printed out all of 3 the search results of all of these searches. Anything 4 that I printed out or had my assistant print out, I have 5 produced to you. 6 Q. And if you didn't print them out, have you 7 referenced them somewhere in the report? 8 A. I don't know. I'd have to go back and look. 9 It helped form my general knowledge base and the 10 opinions that I arrived at. 11 Q. If the websites that you looked at are not 12 referenced in this report, do you have notes of which 13 sites you referenced somewhere? 14 A. I don't know. I need to talk to Mr. Way and 15 see if we have further notes of those searches and 16 exactly what we did and which sites we landed on. We 17 didn't always just print out everything we found, but I 18 would have to go back and look and see if we have notes 19 of that. I'd be happy to provide them to you. 20 Q. That would be obviously preferably during a 21 break in the deposition so we can talk about it today. 22 A. Well, I don't know if he's available today to	1 Q. No, I'm asking if you routinely conduct them. 2 A. I've conducted TESS searches -- yes. I don't 3 know. I mean, not weekly, not monthly, but on, you 4 know, nontrivial bases or numbers of times I have 5 conducted TESS searches on this -- I was making a 6 statement about one of the reasons that these are done. 7 Q. But you don't routinely do it? 8 A. I didn't say that. 9 Q. Okay. The question is -- so you do it not on a 10 monthly basis, not on a weekly basis, but not 11 insubstantially or something? What did you say? 12 A. I say if I were asked to do -- to determine 13 whether a particular mark is available for registration 14 or has already been registered by another entity, then 15 it would be routine to do a TESS search. 16 Q. Okay. But you don't do that on a weekly basis 17 or a monthly basis? 18 A. Well, that's a different usage than the word 19 "routinely." That's periodically or frequently. 20 Q. Well, how often do you do it for that purpose? 21 A. I don't know. I do it every so often when this 22 kind of issue comes up in the course of a year and
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1 have that conversation, but I will try. 2 Q. In paragraph C you reference the United States 3 patent and trademark TESS searches that you conducted 4 between August 15 and September 15, and then you say, 5 "TESS searches are routinely conducted to determine 6 whether a particular mark is available for registration 7 or has already been registered by another entity." 8 Do you routinely conduct trademark searches for 9 that purpose? 10 A. I have conducted TESS searches for a lot of 11 purposes? 12 Q. Do you routinely conduct them to determine 13 whether a particular mark is available for registration 14 or has already been registered by another entity? 15 A. I have done that. 16 Q. Do you do it routinely? 17 A. I don't know what you mean by the word 18 "routinely"? 19 Q. Well, I'm just using the same word that you 20 used in your report. 21 A. I said that they are routinely conducted. I 22 didn't say that they are by me.	1 somebody asks me for advice about this. 2 Q. Okay. That's all I'm asking. 3 In paragraph 6(c) you say, "I also conducted or 4 caused to be conducted trademark document retrieval 5 (TDR) and/or Google searches where appropriate." 6 Do you see that? 7 A. Yes. 8 Q. Who conducted those searches? 9 A. Either myself or Brendan Way. 10 Q. And, again, were those produced to us? 11 A. The results of them where we printed them out 12 were produced to you. 13 Q. Did Brendan Way have any discussions with 14 dentists in connection with this case? 15 A. No. 16 Q. Did Brendan Way have any discussion with dental 17 labs in connection with this case? 18 A. No. 19 Q. Did Brendan Way work on this case from the 20 period August 15, 2012, to September 15, 2012? 21 A. Yes. 22 Q. Did he work full-time on this matter during
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1    that time period?	1    Q. And how did Mr. Shuck say it?
2    A. No.	2    A. Brux-ZER and BRUX-er.
3    Q. So what are his other responsibilities?	3    Q. Have you reviewed Mr. Shuck's deposition video?
4    A. Brendan Way is a former student of mine and a	4    A. No.
5    former market research analyst. Before he became a	5    Does he say it like you say it?
6    lawyer, he spent five years as a market research	6    Q. Well...
7    analyst. He is now an attorney who does a variety of	7    A. You're not testifying?
8    kinds of civil litigation, including trademark law, and	8    Q. I'm not testifying.
9    has registered several trademarks and is well trained in	9    A. I know.
10   doing searches in the USPTO databases.	10   Q. Turning to page 9 --
11   Q. So he doesn't work for you full-time?	11   A. Yes?
12   A. No.	12   Q. -- paragraph E towards the top of the page.
13   Q. In paragraph -- it's paragraph 6, but	13   A. Uh-huh.
14   subparagraph 4.	14   Q. It says you reviewed numerous Web searches to
15   A. Could you tell me what page you're on, please?	15   determine whether or not monolithic or solid zirconia
16   Q. Page 4.	16   crowns are referred to as BruxZir crowns.
17   A. Page 4. Top, middle or bottom?	17   A. Yes.
18   Q. It's No. 4.	18   Q. Okay. We received two Web searches in the
19   A. Oh, 4, uh-huh, right.	19   production that was made on Wednesday.
20   Q. "Our primary TESS search for." You were	20   A. Uh-huh.
21   searching for the term "Zir." Do you see that?	21   Q. Are those the Web searches that you're
22   A. Yes.	22   referring to in this paragraph?
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1    Q. It says, "None of the search results are	1    A. I'm sorry. Please state that again.
2    homophones or phonetically similar to 'BruxZir' or	2    MS. ZADRA-SYMES: Can you read the question,
3    'bruxer' aside from the Glidewell marks."	3    please.
4    A. Yes.	4    (Record read as follows:
5    Q. So you were looking for phonetically similar	5    "Question: Are those the Web
6    marks to BruxZir and the term "bruxer," b-r-u-x-e-r?	6    searches that you're referring to in
7    A. Yes.	7    this paragraph?"
8    Q. And, again, in Search No. 5 in the last	8    THE WITNESS: Can I see the ones that you're
9    sentence you say, "None of the search results are	9    referencing?
10   homophones phonetically similar to 'BruxZir' or 'bruxer'	10   MS. ZADRA-SYMES: Can you mark that as the next
11   aside from the Glidewell marks."	11   exhibit number, please.
12   A. Yes.	12   Handing you what the court reporter has marked
13   Q. So "BruxZir" and "bruxer" are phonetically	13   as Exhibit No. 73.
14   similar; is that correct?	14   (Whereupon, Exhibit 73 was marked
15   A. I don't think they're phonetically similar.	15   for identification.)
16   Q. You don't think "BruxZir" and "bruxer" are	16   THE WITNESS: Yes.
17   phonetically similar?	17   MS. ZADRA-SYMES: And let's mark this one
18   A. Well, the way you're saying them, I think	18   as 74.
19   intentionally to make them sound phonetically similar,	19   (Whereupon, Exhibit 74 was marked
20   they could be seen as phonetically similar.	20   for identification.)
21   Q. So how do you say them?	21   BY MS. ZADRA-SYMES:
22   A. Brux-ZER and BRUX-er.	22   Page 59
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<p>1 Q. So these are the only Web search report results 2 that we received in the production on Wednesday night. 3 So did you do any other searches? 4 A. I think we did. I don't know if we printed 5 them out. I have to go back and look at those notes 6 that we talked about a moment ago. 7 Q. And then further down in the same section of 8 the report here on page 9, you said, "When one types the 9 search term 'bruxer crown' into Google, at least as of 10 September 15, the search engine automatically corrects 11 the term to 'bruxzir crown' with a Z." 12 A. Yes. 13 Q. With a lowercase b and a lowercase z? 14 A. Yes, ma'am. 15 Q. Then you say, "and all but one of the first 16 five pages of results are clearly referring to the 17 Glidewell BruxZir product." 18 Do you see that? 19 A. Yes, I see that. 20 Q. We did not receive five pages of results. 21 A. I see that. You should. We will get you the 22 five pages of results.</p>	<p>1 crown," b-r-u-x-e-r crown -- 2 A. Yes? 3 Q. -- is a Glidewell crown? 4 A. I would have to go back and look and dig down 5 into this particular website. 6 Q. So you don't know? 7 A. Not as I sit here. 8 Q. Then the next one on the list on Exhibit 74 is 9 Z-Brux crowns. Do you see that? 10 A. Yes, I do. 11 Q. Is it your understanding that Z-Brux crown is a 12 Glidewell product? 13 A. I need -- this is barthlab.com. I would want 14 to go back and look at that. 15 Q. So you don't know? 16 A. Right. 17 Q. And then the next one down is Twitter -- 18 A. Well, he says here, "When you force-quote 19 Google to search for a bruxer crown, one of the first 20 search results that come up" -- I'm talking about my 21 report at page 9 -- "is Barth Dental Laboratories, which 22 offers a Z-Brux crown that makes reference to a</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. And turning to what we did receive, which is 2 the first search you're referring to where the 3 search engine automatically corrects the search to 4 "bruxzir crown" with a Z, if you look at Exhibit 74 -- 5 A. Yes? 6 Q. -- that appears to be the search you're 7 referring to. 8 A. Yes. 9 Q. On that page, is it correct that they're all 10 referring to the Glidewell product? 11 A. Let me just go ahead and take another glance at 12 it. 13 Well, I believe Mr. Way clicked on all of them 14 and went to the websites of all of these to verify that 15 they were referring to the Glidewell product. And based 16 on that, we made this statement. 17 Q. Okay. So, according to your report then -- 18 A. Yes? 19 Q. -- the fourth reference on page 1 of the search 20 report that's in Exhibit 74 -- 21 A. Yes? 22 Q. -- that references "full zirconia bruxer</p>	<p style="text-align: right;">Page 64</p> <p>1 March 2011 article in Dental Economics," and then it's 2 discussed. 3 "However, a Web search for the article notes 4 that Glidewell is the initiator of the solid zirconia 5 tooth restoration," and it's largely about BruxZir. So 6 I'd have to -- I'd want to go back and do the digging 7 into the website to give you a better answer of this 8 particular one. 9 Q. Okay. 10 A. Okay? 11 Q. And then the next one is Twitter/PittmanLab. 12 A. Uh-huh. 13 Q. "Get our custom 'Bruxer,'" B-r-u-x-e-r. 14 Do you see that? 15 A. Yes. 16 Q. Is it your opinion that that is a Glidewell 17 product? 18 A. Again, I would want to double-check. 19 Q. And then further down the page there's a 20 heading that says "Full Zirconia Crown." 21 A. Yes. 22 Q. It's a reference to continentaldental.com, and</p>

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1 then --	1 A. No.
2 A. Yes, I see that.	2 Q. Okay. So when you said "he said" in
3 Q. Is it your opinion that that's a Glidewell	3 paragraph 9, who were you referring to?
4 product?	4 A. I'm referring to myself based on the
5 A. I would also need to go back and check that	5 information that he gave me.
6 particular website.	6 Q. And on page 10 --
7 Q. And then further down the page --	7 A. Yes?
8 A. Yes?	8 Q. -- in the top paragraph, which is
9 Q. -- "Dental Lab Service, Infinity Dental	9 paragraph 6(e), there's a reference to 170 BruxZir,
10 Laboratory."	10 B-r-u-x-Z-i-r, certified labs.
11 Do you see that?	11 Do you see that?
12 A. Yes.	12 A. Just give me a moment, please. You're on
13 Q. It says under there, "We also offer full	13 page 10?
14 zirconia or Bruxer" -- B-r-u-x-e-r -- "crowns."	14 Q. Yes.
15 A. I see that.	15 A. You're about six lines down?
16 Q. Is it your opinion that's a Glidewell product?	16 Q. Yes.
17 A. I would want to go back and check.	17 A. Yes, I see that.
18 Q. Okay. And during the break you will also	18 Q. Would you like to read it before I ask you a
19 obtain for us the other pages that you reference in your	19 question?
20 report that we don't have?	20 A. Go ahead.
21 A. I will attempt to do so, if I can get ahold of	21 Q. So have you looked at the websites of the 170
22 Mr. Way.	22 BruxZir-certified labs?

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1 Q. And then also looking at Exhibit No. 74, at the	1 A. I need to double-check on that.
2 top where it says how many hits were received on that	2 Q. Do you know if Glidewell's labs actually
3 search --	3 identify themselves as licensees of Glidewell?
4 A. Uh-huh?	4 A. On their websites?
5 Q. -- it says there are 50,500 results.	5 Q. Yes.
6 A. You're in Exhibit 74?	6 A. I do not know. I know they identify -- they
7 Q. Yes.	7 agree to identify -- to use the BruxZir trademark and
8 A. I see that.	8 some sort of labeling on the product that they make and
9 Q. Did you or your assistant look at all 50,000	9 the box that they put it in.
10 results -- or 50,500 results? Sorry.	10 Q. How do you know that?
11 A. I think he looked at the several first pages	11 A. I was told that by either Mr. Shuck or
12 that are mentioned.	12 Mr. Tachner.
13 Q. And then in Exhibit 73 at the top, the search	13 Q. Did you see any samples of that?
14 references 10,500 results. Do you see that?	14 A. I would have to go back and look at the samples
15 A. I do.	15 that I referenced earlier before I give you a definitive
16 Q. Did you or your research assistant look at all	16 answer on that.
17 those results?	17 Q. In the same paragraph you say, "Furthermore,
18 A. He didn't look at all 10,000 results.	18 the splash page for Barth Dental Laboratories advertises
19 Q. What did he look at?	19 \$40 off your first BruxZir" -- B-r-u-x-Z-i-r -- "crown.
20 A. I believe the first five pages for each.	20 One much assume that Barth is either such a new
21 Q. So did your research assistant actually write	21 BruxZir" -- B-r-u-x-Z-i-r -- "certified lab that their
22 this report?	22 Web page has numerous typos on it while they come up to

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<p>1 speed, or they are attempting to free-ride on the 2 advertising on the network of over 170 BruxZir" -- 3 B-r-u-x-Z-i-r -- "certified labs." 4 A. Yes? 5 Q. Did you check to see whether Barth is a 6 certified lab of Glidewell? 7 A. I think we did, but I don't recall the result 8 of that investigation at this point in time. But I can 9 give you that too. 10 Q. So is it your opinion that everybody who is 11 using the term B-r-u-x-Z-i-r is attempting to free-ride 12 on Glidewell's B-r-u-x-Z-i-r trademark? 13 A. If they use the term B-r-u-x-Z-i-r, yes. 14 Q. Even if it's not used with a capital B or a 15 capital Z. 16 A. I don't think they should be using it. 17 Q. Even if it's not with a capital B or a 18 capital Z? 19 A. Correct. 20 Q. Okay. 21 A. Yes, because the word "BruxZir" with a Z-i-r is 22 not the same as the word b-r-u-x-e-r.</p>	<p>1 you're asking me general questions, but I'm talking 2 about a specific example. 3 Q. I'm asking you what you mean in this report in 4 paragraph 10 -- 5 A. And I think I answered it. You asked me 6 whether B-r-u-x-Z-i-r even if the B and the Z are not 7 capitalized -- 8 Q. Yes. 9 A. -- is potentially free riding on Glidewell's 10 registered trademark, and I said yes, if they're not 11 authorized. 12 Q. And you don't know if Barth is authorized? 13 A. I will find out for you. 14 Q. Okay. So going back to Exhibit No. 74 -- 15 A. Yes? 16 Q. -- the fourth reference down says "full 17 zirconia Bruxer crown," B-r-u-x-e-r. 18 A. Yes. 19 Q. Is that an attempt to ride on Glidewell's 20 BruxZir name? 21 A. Not in my opinion. 22 Q. The next one down Z-Brux crowns, is that an</p>
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1      opinion on it in this deposition?	1      A. Yes, I do.
2      Q. For your report, did you review all those	2      Q. Would that reference to Bruxer be an attempt to
3      materials of Barth Dental Laboratories?	3      free-ride on the BruxZir trademark?
4      A. I -- for Barth Dental Laboratories I said it's	4      A. Not necessarily. Not unless they were
5      either this or that or this or that. That's what I	5      attempting to imply that they were an authorized lab of
6      said. I didn't -- we reviewed the website of Barth	6      Glidewell. I think if I were advising them, I would
7      Dental Laboratories. We looked at it in careful	7      have told them not to capitalize the B.
8      consideration, yes.	8      I think there's an argument that they're using
9      Q. Did you review any other materials of Barth	9      it in a way that is not meant to be a trademark. If
10     Dental --	10     they're using it in a way that's not meant to be a
11     A. I don't have --	11     trademark, but just a reference to the crown, then
12     Q. -- laboratories?	12     that's different than using it as a trademark.
13     A. -- access to their independent, hard-print	13     Q. And on page 10 --
14     materials.	14     A. Yes? Of my report?
15     Q. Did you speak to anybody at Barth Dental?	15     Q. -- of your report, after the sentence we just
16     A. No.	16     referenced, the next sentence says, "Additional hits are
17     Q. Then the next one on the list is	17     found for the York Dental Lab BruxZir crown, which
18     Twitter/PittmanLab.	18     apparently is such a new product, it does not appear on
19     A. Yes.	19     York's crown and bridge Rx form certainly available from
20     Q. It says, "Get Our Custom Bruxer," B-r-u-x-e-r,	20     the site."
21     and in the summary underneath that it says, "Get our	21     A. I've lost you. Let me find it.
22     custom Bruxer" -- B-r-u-x-e-r -- "bur" -- b-u-r --	22     Q. It's the sentence beginning --
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1      "block to aid in all your Bruxer crown" -- B-r-u-x-e-r,	1      A. Oh, you're up a little bit higher. Just one
2      crown.	2      moment, please.
3      Would that be an attempt to free-ride on the	3      Okay. Yes, I see the language.
4      Glidewell trademark?	4      MS. ZADRA-SYMES: Okay. Now, we did not get
5      A. That alone I don't think is, no.	5      that hit from your production. It was not in the search
6      Q. Then further down the page under the heading	6      results, but we do have a printout of that page from
7      "Full Zirconia Crown" --	7      documents produced by Keating Dental in this case.
8      A. Yes?	8      So I'm handing you what the court reporter has
9      Q. -- would that reference to full zirconia crown	9      marked as Exhibit 75, which is documents Bates-stamped
10     by Continental Dental Laboratories be an attempt to	10     KDA-002445 and has been introduced in this case.
11     free-ride on the Glidewell trademark -- I'm sorry -- the	11     (Whereupon, Exhibit 75 was marked
12     Glidewell BruxZir trademark?	12     for identification.)
13     A. Just that? What, those three words?	13     BY MS. ZADRA-SYMES:
14     Q. Yes.	14     Q. Is the reference in your report on page 10 to
15     A. "Full zirconia crown"?	15     the York Dental Lab BruxZir crown a reference to this
16     Q. Uh-huh.	16     crown shown in this document?
17     A. No.	17     A. I am not sure without going back and
18     Q. And then further down the page, under "Dental	18     double-checking. I would want to do that before saying
19     Lab Service, Infinity Dental Laboratory," they state,	19     yes or no based on just looking at this page.
20     "We also offer full zirconia or 'Bruxer,'" B-r-u-x-e-r	20     Q. Looking at the top of this page, it's headed
21     in quotes -- "crowns for a full porcelain crown."	21     "Bruxer," B-r-u-x-e-r.
22     Do you see that?	22     Do you see that?
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1 A. I do, yes. 2 Q. And underneath it says "Bruxer Solid 3 Zirconia" -- capital B, capital S, capital Z -- "is a 4 monolithic solid zirconia restoration with no porcelain 5 overlay." 6 A. Uh-huh? 7 Q. Is this an attempt to free-ride on the BruxZir 8 trademark? 9 A. I wouldn't give an opinion about that. 10 Q. So you don't know? 11 A. I don't know looking at just this. 12 Q. So when -- 13 A. Are they using it as a trademark? 14 Q. I don't know. This is their Web page that is 15 referenced in your report. 16 A. Yes, yes. But I don't see an R. I don't see 17 a TM after that. 18 Q. Okay. So that would help to indicate if it was 19 being used as a trademark? 20 A. It could, yes. 21 Q. Then the next one referenced in your report is 22 Mascola Esthetics Dental Lab.	1 will do for you. 2 Q. On the first page -- 3 A. Yes? 4 Q. -- there is -- this is an Rx form. Do you see 5 that at the top? It says -- 6 A. I do, yes, yes. 7 Q. On the first page, in the second column under 8 "Cosmetics," there's a reference to Xtreme, with a 9 capital X-t-r-e-m-e, Bruxer, B-r-u-x-e-r. 10 A. Yes, I see that. 11 Q. And in parentheses "Solid Zirconia." Do you 12 see that? 13 A. I do see that, yes. 14 Q. Is that an attempt to free-ride on the 15 Glidewell BruxZir trademark. 16 A. It may be. I would want to look at more of 17 their information. 18 Q. Have you looked at any other information of the 19 Mascola Esthetics Dental Lab? 20 A. We did do some digging here on it, but I'd have 21 to go back and refresh my recollection about the 22 Internet archive that we're referring to.
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1 A. Yes? 2 Q. We did not receive anything in the production 3 you gave us regarding Mascola Esthetics Dental Lab. 4 A. Let me make a note of that too, and if we 5 printed that out, we will get that to you. 6 MS. ZADRA-SYMES: Can you make that one 7 exhibit. 8 This is actually one exhibit, 76. 9 (Whereupon, Exhibit 76 was marked 10 for identification.) 11 MS. ZADRA-SYMES: So this is two documents that 12 have been produced in this case. The first one is 13 Bates-numbered KDA-002444, and then the next pages are 14 KDA-002799 through KDA-002800. 15 THE WITNESS: Uh-huh? 16 BY MS. ZADRA-SYMES: 17 Q. Do you see that? 18 A. I do, yeah. 19 Q. Is this the product that's being referenced in 20 your report on page 10 as the Mascola Esthetics Dental 21 Lab? 22 A. I don't know. I need to double-check, which I	1 Q. Turning to the next page -- 2 A. Yes? 3 Q. -- under the fee schedule -- 4 A. Yes? 5 Q. -- there's a reference under "Cosmetics" 6 slightly more than halfway down. 7 Do you see that? 8 A. I do. 9 Q. It says "Full-Contour Zirconia BruxZir." 10 A. I do. 11 Q. Is that an attempt to free-ride on the 12 Glidewell BruxZir trademark? 13 A. It may be. 14 Q. What was your opinion in this report based on 15 when you were referencing the Mascola Esthetics Dental 16 Lab? What were you looking at? 17 A. We were looking at the Internet archive and 18 their website, a snapshot of their home page, but 19 apparently we haven't given you that. 20 Q. No. 21 A. But we will. 22 Q. Did you review any other materials of Mascola
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1    Esthetics Dental Lab? 2    A. None other than what's referenced in this 3    paragraph. 4    Q. Did you speak to anybody at Mascola Dental 5    Labs? 6    A. No. 7    THE WITNESS: Can we take a quick bathroom 8    break? 9    MS. ZADRA-SYMES: Yes, of course. 10   THE VIDEOGRAPHER: Off the record at 11:29 a.m. 11   This is the end of Tape 1. 12   (Recess taken.) 13   THE VIDEOGRAPHER: And we are on the record 14   at 11:35 a.m. This is the beginning of Tape 2. 15   BY MS. ZADRA-SYMES: 16   Q. Are you familiar with the ability to pay Google 17   to ensure that a website displays a term higher in 18   search results? 19   A. Yes. 20   Q. And did you ask Glidewell if it had done that? 21   A. No. 22   Q. Are you familiar with the use of meta tags in a	1    make them less important so that people can't get up 2    high in the natural search results, and now they're 3    forced to try to pay Google to get up high. 4    So, I mean, I'm very, very well aware of about 5    these practices, and I haven't investigated that at all 6    in any of those permutations with regard to Glidewell or 7    Keating. 8    Q. And that would be true for whether they have 9    made paid placements for their own trademark BruxZir or 10   for the term "bruxer," b-r-u-x-e-r? 11   A. I have not looked into that for either of those 12   terms or "again" for Keating. 13   THE WITNESS: Has there been discovery in that? 14   BY MS. ZADRA-SYMES: 15   Q. When is a trademark considered descriptive? 16   A. When it describes a quality, characteristic or 17   ingredient or use of the product or service in 18   connection -- in which connection it's going to be used 19   as a trademark. 20   Q. If a trademark is descriptive at the time it's 21   adopted, is it protectable or registerable? 22   Is it registerable?
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1       Q. How much use does the trademark office usually 2 look for in terms of relation?  3       A. Well, I think that there's a presumption that 4 if a descriptive term has been used for five years, that 5 it would be assumed or presumed that it has secondary 6 meaning. But that's just a sort of presumption, and 7 marks that have been used for less than that can be 8 found to have acquired secondary meaning.  9       Q. Turning back to page 11 of your report -- 10      A. Yes?  11      Q. -- you say in paragraph 8, "A mark is 12 categorized as generic and thus not entitled to legal 13 protection under U.S. trademark law when it is seen by a 14 majority of relevant consumers in the relevant markets 15 as a generic name for a particular service or good" and 16 you cite to the case King-Seeley Thermos Co. v. Aladdin 17 Industries, Inc., which is a Second Circuit case 18 from 1963.  19      A. Yes. 20      Q. Is there a reason why you didn't cite a 21 California case? 22      A. No.	1       your client entered the market and what the status of 2 use was in the relevant marketplace at that time.  3       Q. Do you know when our client entered the market? 4       A. Yes. I think it entered the market -- 5 Glidewell entered the market, to my knowledge, in June 6 of 2009, and your client entered the market in 2011, the 7 exact month of which is escaping me as we speak. Part 8 of my confusion about that was that you filed a -- your 9 client filed a, I believe, 1(b) trademark application, 10 which is an intent to use. So I had to dig around a 11 little bit and think to figure out when their actual 12 first use was. But it was sometime in 2011.  13      Q. And your understanding is that Glidewell began 14 marketing its products in June of 2009? 15      A. Yes. Under the BruxZir name, June of 2009. 16      Q. Yes. 17       In paragraph 13, on page 11 -- 18       A. Yes. 19       Q. -- you say, "The Plaintiff's registered 20 trademark BruxZir is, in my opinion, a suggestive mark 21 because it suggests a particular quality or 22 characteristic of the goods and services Glidewell
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1       Q. Are you familiar with the California cases 2 involving genericness in the Ninth Circuit?  3       A. Yes.  4       Q. You understand this case is a Ninth Circuit -- 5 it's a case pending in California?  6       A. Yes, yes. And Ninth Circuit law would govern. 7       Q. Are you familiar with the "who-are-you/what- 8 are-you" test?  9       A. Yes. 10      Q. Why did you not reference that in your report? 11      A. No particular reason. I'd be happy to discuss 12 it with you if you want me to now or at trial. 13      Q. So what is the most recent case in California 14 that applies the "who-are-you/what-are-you" test in the 15 Ninth Circuit?  16      A. I don't know the most recent case. I can tell 17 you the Yellow Cab case is important in this regard, 18 which holds, among other things, that the time for 19 genericness is the time when the defendant entered the 20 market, not thereafter.  21       So in this case in trying to determine whether 22 the Plaintiff's mark was generic, we'd want to see when	1       provides." 2       What quality or characteristic is it 3 suggesting? 4       A. That zirconia is a good material to use for 5 patients who have teeth damage due to bruxism. 6       Q. Anything else? 7       A. Anything else? Well, it suggests -- no, 8 nothing else. 9       Q. Does it suggest anything about the intended 10 user? 11      A. I think I just said that. I said that it 12 suggests that zirconium is a good product to use for 13 patients who suffer defects that could have occurred 14 from bruxism. 15      Q. And what are those patients referred to as in 16 the dental industry? 17      A. Well, I think we went over this, but some of 18 those patients are referred to as bruxers, people who 19 grind. They're also referred to as grinders. 20       Q. Turning to paragraph 14 -- 21      A. Yes? 22       Q. -- you say, "A search of the Internet and of
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1 the USPTO databases reveals that the generic name for 2 solid zirconia crowns is 'solid zirconia,' 'full-contour 3 zirconia,' 'total zirconia' or 'monolithic zirconia.'" 4 Do you see that? 5 A. Yes, I see it. 6 Q. And I believe you referenced earlier that 7 another generic reference that's a synonym of "solid 8 zirconia" and "full-contour zirconia" would also be 9 "all-zirconia"; is that correct? 10 A. Yes. 11 Q. And then the example given is a page from the 12 ada.org product guide. 13 A. Yes. 14 Q. Do you see that? 15 A. Yes. 16 Q. Were there any other printouts that you made 17 for searches dealing with this point? Because we only 18 received that one page. 19 A. Oh, I see. I need to go back and look on that. 20 Let me make a note of that too, because I do say CEG, 21 and I want to make sure that you have a full printout of 22 whatever we saw, if we printed it out, if we printed out	1 A. I see that. 2 Q. And it says "Vendor, Oral Arts Dental 3 Laboratory, Inc." 4 A. Yes. 5 Q. There is no TM or R in a circle after the word 6 "BruxZir." Do you see that? 7 A. Yes. 8 Q. Do you know if Oral Arts Dental Laboratory is 9 an Glidewell-authorized laboratory? 10 A. I do believe that Mr. Way made that 11 investigation and found out that it is. 12 Q. From these website pages can you tell -- 13 A. No. You would have to go further, but he did 14 go further, to my recollection. 15 Q. And then next one is "BruxZir Solid Zirconia," 16 again without a TM or an R in a circle, and that one 17 lists Glidewell Laboratories as the vendor. 18 Do you see that? 19 A. Yes, I do. 20 Q. Below that, there's another one with "BruxZir 21 Total Zirconia Crowns" -- 22 A. I see that.
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<p>1 free riding on the BruxZir name due to their position as      2 a market leader, or are in fact selling a finished      3 product made from BruxZir materials."</p> <p>4 First of all, what individuals are you talking      5 about?</p> <p>6 A. I think I am talking about the people who use      7 "BruxZir" in this -- in the printouts that we reference.</p> <p>8 Q. And how --</p> <p>9 A. They're either authorized based on what we were      10 able to tell, or they're using it inappropriately.</p> <p>11 Q. When you said "BruxZir," did you mean with a      12 Z-i-r?</p> <p>13 A. Of course.</p> <p>14 Q. It's not by referencing the term "all-zirconia      15 crown" that they're attempting to free-ride on the --</p> <p>16 A. No, no, no, no, no, no, no. That would be      17 a misunderstanding of what I was trying to convey. No.      18 The world is free to use the term "all-zirconia crown,"      19 including your client. It would be very nice, actually,      20 if they'd call it KDA full zirconia crown.</p> <p>21 Q. In paragraph 16 --</p> <p>22 A. Yes?</p>	<p>1 out and verbally meet with labs or dentists and      2 verbally -- orally use the word "BruxZir." They have      3 marketing materials; they have website materials; that      4 most of the advertising materials that Glidewell relies      5 on are visual in nature.</p> <p>6 Therefore, the visual appearance of the word is      7 significant, and when you are isolating and focusing on      8 Glidewell's mark, how it looks is very important. And      9 the fact that it has a Z in it is important, and an i,      10 both of which letters -- a capital Z and an i, both of      11 which letters visually distinguish it from the word      12 "bruxer," b-r-u-x-e-r.</p> <p>13 Q. So other than Mr. Shuck, did you talk to      14 anybody else about the perception of relevant consumers      15 in the marketplace?</p> <p>16 A. Just based on my Internet searches and my PTO      17 searches.</p> <p>18 Q. So the answer is no?</p> <p>19 My question is --</p> <p>20 A. Did I talk to anybody --</p> <p>21 Q. -- did you talk to anybody --</p> <p>22 A. -- individuals --</p>
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<p>1 Q. -- after referencing the Keating Dental Labs --      2 I guess we should start with paragraph 15. So if you'd      3 just read paragraph 15 to yourself.</p> <p>4 A. Okay.</p> <p>5 Q. Then I can ask you a question about      6 paragraph 16.</p> <p>7 A. Okay.</p> <p>8 Yes?</p> <p>9 Q. So in paragraph 16 you're saying that the      10 argument made by Keating Dental Lab that the term      11 "BruxZir" is phonetically equivalent to "bruxer,"      12 b-r-u-x-e-r, you're saying that that argument is not      13 consistent with the way Plaintiff's mark 'BruxZir' is      14 used or perceived in the relevant marketplace.</p> <p>15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. How many people did you talk to to establish      18 their perception?</p> <p>19 A. I looked at -- I talked to Mr. Shuck about      20 people's perception, and one of the things Mr. Shuck      21 told me that I think is very significant is that      22 Glidewell does not have a sales division where people go</p>	<p>1 Q. Yes.</p> <p>2 A. -- dentists.</p> <p>3 Q. Yes.</p> <p>4 A. I think you asked me all of those things      5 before.</p> <p>6 Q. Well, I'm asking it, but for this question      7 right here.</p> <p>8 A. I see. No, I already answered the question      9 that I didn't talk to dentists or dental labs.</p> <p>10 Q. To establish their perception?</p> <p>11 A. For any reason.</p> <p>12 Q. Did Glidewell give you any discs to review of      13 their marketing materials?</p> <p>14 A. As opposed to hard copies?</p> <p>15 THE WITNESS: Mr. Tachner, did you? Yeah.</p> <p>16 Okay. Yes.</p> <p>17 BY MS. ZADRA-SYMES:</p> <p>18 Q. Did you review any discs?</p> <p>19 A. I reviewed their marketing materials, uh-huh.</p> <p>20 Q. So did you review a disc with video recordings      21 on it?</p> <p>22 A. I have reviewed video recordings, yes, uh-huh.</p>
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1 Q. Are you aware that those materials, the video 2 recordings on the discs, are -- 3 A. Exist? 4 Q. Well, first of all, one question: You're aware 5 that they exist; yes? 6 A. Yes. 7 Q. Are you aware that they are also sent to 8 dentists? 9 A. I think so, yeah. The exact mechanism by which 10 they get to dentists or dental labs, I'm not sure. 11 Q. And then on the next page of your report, 12 page 13 -- 13 A. Uh-huh? 14 Q. -- you say at the top, "Under United States 15 trademark law, a mark should be judged based on its 16 sight, sound and meaning (see In Re National Data Corp., 17 753 F.2d 1056), which is a Federal Circuit case from 18 1985. 19 A. Yes? 20 Q. I assume you read that case before you put it 21 in your report? 22 A. Yes.	1 likelihood of confusion test. And one of the issues in 2 this case is how strong is the Plaintiff's mark and how 3 does it appear, and I think it's appropriate to use this 4 concept of visual presentation of this mark as part of 5 the overall context of determining whether it's generic. 6 Q. And again you didn't cite any California cases 7 in your report on that point. 8 A. I would be happy to give them to you -- or you 9 mean Ninth Circuit cases, I think is what you mean. 10 Q. Well, you didn't cite California either. This 11 is a Federal Circuit case. In fact, this case is 12 involving a trademark application in the trademark 13 office -- 14 A. Yes. 15 Q. -- is that right? 16 A. Yes. 17 Q. And then in paragraph 17, you say, "In my 18 searches of the USPTO databases and of the relevant 19 markets on the Internet, I found no use of 'BruxZir' as 20 a slang term by dentists for people who suffer from 21 bruxism." 22 A. Correct.
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1 Q. So is it your opinion that that case is 2 saying to determine whether a mark is generic, you have 3 to look at its sight, sound and meaning? 4 A. I didn't say that. And, no, it's using the 5 sight, sound and meaning test for confusion, but I think 6 it's appropriate to use it in this case as well for 7 genericism. 8 Q. Is that standard in genericness cases to use 9 the sight, sound and meaning test for -- 10 A. It can be, uh-huh. 11 Q. But you're not relying on this case for that 12 proposition? 13 A. I'm relying on this case as a general citation 14 to what the sight, sound and meaning test is, and then 15 I'm applying that and the principle underlying it to 16 this case, and particularly to the genericness issue in 17 this case. 18 Q. So you're applying a factor from the likelihood 19 of confusion test to determine whether or not the mark 20 is generic? 21 A. The factor can be used in determining mark 22 strength and the strength of the Plaintiff's mark in the	1 Q. Did you search for the term b-r-u-x-e-r as a 2 slang term by dentists for people who suffer from 3 bruxism? 4 A. I'd have to go back and look. 5 Q. Would it have made any difference to your 6 searching methodology if you were not searching for it 7 as a slang term, but as a term of art in the industry? 8 A. Let me just think about your question. Would 9 it have made any difference to my methodology if I were 10 searching for it not as a slang term, but as a term of 11 art in the industry? 12 No. 13 Q. In paragraph 19 you say that in your searches, 14 which include your USPTO database searches, you found no 15 use of the words "BruxZir" or "bruxer" as a generic name 16 of custom-made solid zirconia crowns or as generic name 17 of the material that is used to make such crowns. 18 A. I see that. 19 Q. Is it your opinion that those words would have 20 to be found in trademark office descriptions of goods in order to be considered generic? 21 A. No.
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1 Q. You state in the same paragraph at the end, 2 "Instead, the related terms 'brux,' 'bruxism' and 3 'bruxing' have been predominantly used to describe the 4 treatment/prevention of bruxism as a condition via 5 mouth guards, splints, electronic devices, et cetera." 6 A. I see that. 7 Q. Is that what Glidewell's BruxZir product does? 8 Does it treat or prevent bruxism? 9 A. It treats teeth that have been injured by 10 bruxism. It's not a treatment for bruxism in the sense 11 I was talking about here, like a mouth guard, where 12 somebody at night puts a mouth guard in so that the 13 injury to the tooth doesn't occur in the first place. 14 MR. TACHNER: Are we reaching a natural time 15 for -- 16 MS. ZADRA-SYMES: Yeah, that's fine. 17 MR. TACHNER: I mean, it's up to you of course. 18 MS. ZADRA-SYMES: It's fine. It's noon. 19 Can we go off the record? 20 THE VIDEOGRAPHER: Off the record at 12:03 p.m. 21 22 (Whereupon, at 12:03 p.m., the	1 (At 1:29 p.m., the deposition of 2 DAVID J. FRANKLYN was reconvened.) 3 THE VIDEOGRAPHER: And we are back on the 4 record at 1:29 p.m. 5 MS. ZADRA-SYMES: Sir, I'm going to hand you 6 what the court reporter has marked as Exhibit 78. 7 (Whereupon, Exhibit 78 was marked 8 for identification.) 9 MS. ZADRA-SYMES: It's a document that we have 10 produced in this case, and it's labeled KDA-002152 11 through 002160. 12 THE WITNESS: Uh-huh. 13 MS. ZADRA-SYMES: And it is an article taken 14 from the Journal of Oral Rehabilitation, which is the 15 title of a journal. 16 EXAMINATION (RESUMED) 17 BY MS. ZADRA-SYMES: 18 Q. Do you see that? 19 A. Yes. 20 Q. And it is dated February 1995. Do you see 21 that? 22
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1 deposition of DAVID J. FRANKLYN was 2 adjourned for noon recess.) 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	1 A. I see that. 2 Q. And if you turn to the next page -- 3 A. What page? The second page? 4 Q. Actually, the third page. Second page of the 5 document, third printed page. 6 A. Okay. 7 Q. On the bottom it says No. 145. 8 A. Yes. You mean 154? 9 Q. No, 145. Sorry -- 10 MR. TACHNER: The page number. 11 MS. ZADRA-SYMES: The page number of the actual 12 article. 13 THE WITNESS: Oh, 145. You are right, yes. 14 BY MS. ZADRA-SYMES: 15 Q. The heading of the document says "Effect of 16 working-side interferences on mandibular movement in 17 bruxers and non-bruxers." 18 Do you see that? 19 A. Yes. 20 Q. Am I pronouncing that correctly? 21 A. Which word? 22 Q. "Bruxer"?
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<p>1 A. The word "bruxer" as it's written?</p> <p>2 Q. Yes.</p> <p>3 A. Well, you have an English accent.</p> <p>4 Q. So why don't we have you read it into the</p> <p>5 record just to avoid any issue there.</p> <p>6 Can you read the heading for me, please?</p> <p>7 A. I'd be happy to. "Effect of working-side</p> <p>8 interferences on mandibular movement in bruxers and</p> <p>9 non-bruxers."</p> <p>10 Q. And then in the summary it says, "The effect of</p> <p>11 working interference on bruxers and non-bruxers was</p> <p>12 studied by applying a metal overlay."</p> <p>13 Do you see that?</p> <p>14 A. I do.</p> <p>15 Q. Now, this article was published in 1995. So</p> <p>16 did you do any research regarding dental literature</p> <p>17 relating to bruxism?</p> <p>18 A. Yes.</p> <p>19 Q. And have you read any articles other than what</p> <p>20 is referenced in your report?</p> <p>21 A. No. I have not read this article.</p> <p>22 Q. And other than what is referenced in your</p>	<p>1 symptoms of CMD in bruxers classified by the degree of</p> <p>2 severity."</p> <p>3 Q. In the abstract, in the second sentence it</p> <p>4 says, "211 were classified as bruxers according to the</p> <p>5 use of a questionnaire and clinical examination."</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. Then, "147.39 percent presented clinical</p> <p>9 characteristics of mild bruxers."</p> <p>10 A. I see that.</p> <p>11 Q. And then the next sentence says, "Severe</p> <p>12 bruxers presented the lowest degree of jaw opening."</p> <p>13 A. I see that.</p> <p>14 Q. Do these appear to be slang term use of the</p> <p>15 term "bruxer" to you?</p> <p>16 A. No.</p> <p>17 Q. And in Exhibit 78 that we just reviewed --</p> <p>18 A. This one?</p> <p>19 Q. Yeah.</p> <p>20 A. Yes, ma'am?</p> <p>21 Q. Does the reference to "bruxer" in that journal</p> <p>22 appear to be a reference to a slang term to you?</p>
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<p>1 report --</p> <p>2 A. No.</p> <p>3 Q. -- you haven't read any other dental</p> <p>4 literature?</p> <p>5 A. I don't believe so. I'd want to double-check</p> <p>6 that, but...</p> <p>7 MS. ZADRA-SYMES: I'm handing you what the</p> <p>8 court reporter has marked Exhibit No. 79, and I'm trying</p> <p>9 to move fast so that you can get out of here quickly.</p> <p>10 (Whereupon, Exhibit 79 was marked</p> <p>11 for identification.)</p> <p>12 MS. ZADRA-SYMES: This is a document that we</p> <p>13 produced in this case, Exhibit 79. It's marked Document</p> <p>14 No. KDA-002106 through KDA-00218.</p> <p>15 THE WITNESS: Yes?</p> <p>16 BY MS. ZADRA-SYMES:</p> <p>17 Q. Did anybody give you this document to read in</p> <p>18 connection with your report in this case?</p> <p>19 A. I don't believe so.</p> <p>20 Q. Can you read the heading of the article, which</p> <p>21 is on the page No. 268?</p> <p>22 A. "A clinical study of specific signs and</p>	<p>1 A. Which reference?</p> <p>2 Q. Any of the references to "bruxer" or "bruxers."</p> <p>3 A. Well, I haven't read the whole thing, but based</p> <p>4 on the two snippets that you drew my attention to, in</p> <p>5 the context in which they appear, they appear to be used</p> <p>6 as clinical terms.</p> <p>7 Q. But not slang terms?</p> <p>8 A. Correct. I mean, I think something could be</p> <p>9 slang and clinical at the same time, but it's a matter</p> <p>10 of degree as it moves into the language.</p> <p>11 THE WITNESS: Are we done with those two?</p> <p>12 MS. ZADRA-SYMES: Yes. I'm going to hand to</p> <p>13 you what the court reporter has marked as Exhibit 80.</p> <p>14 (Whereupon, Exhibit 80 was marked</p> <p>15 for identification.)</p> <p>16 THE WITNESS: Yes?</p> <p>17 MS. ZADRA-SYMES: It's a document labeled</p> <p>18 KDA-001648 through KDA-001652, which we have produced to</p> <p>19 Glidewell in this case.</p> <p>20 BY MS. ZADRA-SYMES:</p> <p>21 Q. Did anybody give you this document to review in</p> <p>22 connection with your report?</p>
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<p>1 A. Not to the best of my recollection.</p> <p>2 MR. TACHNER: I think this was served after the</p> <p>3 report was created, actually.</p> <p>4 THE WITNESS: Okay. Well, we can still get it</p> <p>5 to me then, can't we?</p> <p>6 MR. TACHNER: Yes.</p> <p>7 THE WITNESS: Then I will review them.</p> <p>8 BY MS. ZADRA-SYMES:</p> <p>9 Q. The abstract on the top of this page after the</p> <p>10 word "Purpose" --"</p> <p>11 A. Yes.</p> <p>12 Q. -- it says, "The aim of the present study was</p> <p>13 to investigate whether bruxers compared to non-bruxing</p> <p>14 individuals apply maladaptive coping strategies."</p> <p>15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. Is that a slang use of the term "bruxer"?</p> <p>18 A. Well, I don't think so because it's in a</p> <p>19 scientific article.</p> <p>20 Q. So, generally, if a term is in a scientific</p> <p>21 article, you would not consider it a slang term?</p> <p>22 A. I would say that as it's used in the article,</p>	<p>1 Q. The title of the article beginning on page</p> <p>2 No. 350.</p> <p>3 A. Yes. It reads as follows: "Comparison of pain</p> <p>4 and quality of life in bruxers and patients with</p> <p>5 myofascial pain of the masticatory muscles."</p> <p>6 Q. And so your opinion would be that that's a</p> <p>7 clinical reference to bruxers and not a slang term?</p> <p>8 A. Yes.</p> <p>9 MS. ZADRA-SYMES: I've handed you what the</p> <p>10 court reporter has marked as Exhibit 82. It's document</p> <p>11 Bates-numbered KDA-001657 through 001661.</p> <p>12 (Whereupon, Exhibit 82 was marked</p> <p>13 for identification.)</p> <p>14 MS. ZADRA-SYMES: This article is titled, "The</p> <p>15 effect of bruxism on periodontal sensation in the molar</p> <p>16 region: A pilot study," and in the middle of the page</p> <p>17 there's a box headed "Clinical Implications."</p> <p>18 BY MS. ZADRA-SYMES:</p> <p>19 Q. Do you see that?</p> <p>20 A. I do.</p> <p>21 Q. It says, "Periodontal sensation is different</p> <p>22 for bruxers relative to non-bruxers, and care should be</p>
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<p>1 it's not being used as a slang term.</p> <p>2 Q. And then the next sentence is, "75 sleep</p> <p>3 bruxers and 38 non-bruxers were selected by dental</p> <p>4 examination and tested by a German coping</p> <p>5 questionnaire."</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. So, again, that would not be a slang use of the</p> <p>9 term?</p> <p>10 A. It appears to be a clinical use of the term --</p> <p>11 nonslang, clinical use of the term "bruxers."</p> <p>12 MS. ZADRA-SYMES: I'm going to hand you what</p> <p>13 the court reporter has marked as Exhibit 81, and this is</p> <p>14 a document labeled KDA-002048 through KDA-002062.</p> <p>15 (Whereupon, Exhibit 81 was marked</p> <p>16 for identification.)</p> <p>17 BY MS. ZADRA-SYMES:</p> <p>18 Q. Has anybody given you this document to review</p> <p>19 in connection with your report in this case?</p> <p>20 A. I don't believe so.</p> <p>21 Q. Can you read the heading for me, please.</p> <p>22 A. You mean the title?</p>	<p>1 taken when adjusting and correcting occlusal contacts</p> <p>2 for fixed prostheses."</p> <p>3 Do you see that?</p> <p>4 A. I do.</p> <p>5 Q. Is that a slang use of the term "bruxer" or</p> <p>6 "non-bruxer"?</p> <p>7 A. It appears to me to be a clinical use of the</p> <p>8 term "bruxer" and "non-bruxer."</p> <p>9 Did we get a date on this document? July 2007</p> <p>10 I think I'm seeing.</p> <p>11 Q. Yes, there's a reference on the top of page 2.</p> <p>12 It says July 2007.</p> <p>13 A. Yes.</p> <p>14 THE WITNESS: Are we done with that?</p> <p>15 MS. ZADRA-SYMES: Yes.</p> <p>16 I've handed you what the court reporter has</p> <p>17 marked as Exhibit 83, and it's Bates-numbered KDA-001738</p> <p>18 through KDA-001742.</p> <p>19 (Whereupon, Exhibit 83 was marked</p> <p>20 for identification.)</p> <p>21 BY MS. ZADRA-SYMES:</p>
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1 Q. Has anybody given you this document to review 2 in connection with your report in this case? 3 A. I don't believe so. 4 Q. And the conclusion on the first page -- 5 A. Yes? 6 Q. -- says, "In this study the occurrence of four 7 clinical signs, posterior or anterior dental attrition, 8 abfractions and occlusal pits, was associated with 9 self-reported bruxers. It is suggested that, primarily, 10 signs of dental attrition may differentiate 11 self-reported bruxers from non-bruxer subjects." 12 Do you see that? 13 A. I do. 14 Q. Is it your opinion that those are not slang 15 usages of the term "bruxer" -- 16 A. Yes. 17 Q. -- and "non-bruxer"? 18 A. Yes. 19 MS. ZADRA-SYMES: So I've just handed you what 20 the court reporter has marked as Exhibit 84, and it's 21 Document No. KDA-002078 through KDA-002086. 22 (Whereupon, Exhibit 84 was marked	1 A. No. 2 Q. So it's correct that they are not references to 3 a slang use of "bruxer"? 4 A. That is correct. 5 Q. Thank you. 6 MS. ZADRA-SYMES: I just handed you a document 7 which has been previously marked in a prior deposition 8 as Exhibit 46. It's Document Bates No. KDA-002832 9 through 002833, and it's headed at the top "Minnesota R form." 11 (Whereupon, Exhibit 46 was marked 12 for identification.) 13 BY MS. ZADRA-SYMES: 14 Q. Do you understand what that means, an R form? 15 A. Generally. 16 Q. What does it mean, generally? 17 A. This is an order form. 18 Q. Halfway down on the left-hand side, there are 19 some products that can be ordered. Do you see that? 20 A. Yes, uh-huh. 21 Q. There's a reference to an all-zirconia bruxer, 22 b-r-u-x-e-r.
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1 for identification.) 2 THE WITNESS: Yes? 3 BY MS. ZADRA-SYMES: 4 Q. Has anybody given you this document to review 5 in connection with your report in this case? 6 A. Not to my recollection. 7 Q. Can you read the title of the article, please? 8 A. "Electromyographic analysis of the masseter and 9 buccinator muscles with the pro-fono facial exerciser 10 use in bruxers." 11 Q. In the abstract there's a reference to, halfway 12 down, "They were divided into a normal control group, a 13 bruxer control group without device, and then 14 experimental bruxer group who used the device. The 15 bruxer group showed a greater masseter EMG amplitude 16 when compared to the normal group." 17 Do you see that? 18 A. I do. 19 Q. Now, in your opinion, are those references to a 20 slang use of "bruxer" or not? 21 A. No. 22 Q. They're not?	1 A. Yes. 2 Q. In your opinion, is that an attempt to trade up 3 the Glidewell BruxZir trademark. 4 A. It may be. 5 Q. What else would you need to look at to 6 determine that? 7 A. Any other uses of it by this company. 8 Q. Have you reviewed any uses by this company of 9 the term "all-zirconia bruxer"? 10 A. No. 11 MS. ZADRA-SYMES: Just for the record, that is 12 b-r-u-x-e-r. 13 BY MS. ZADRA-SYMES: 14 Q. That's correct? 15 A. Oh, you're asking me? 16 Q. Yeah. 17 A. I thought you were telling her. 18 Yes, it is, uh-huh. 19 MS. ZADRA-SYMES: Exhibit 85 is one of the 20 documents you produced to us. 22 (Whereupon, Exhibit 85 was marked
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1 for identification.) 2 BY MS. ZADRA-SYMES: 3 Q. It doesn't have Bates numbers on the bottom, so 4 I just want to make sure you recognize it as a document 5 that you produced to us. 6 A. Okay. 7 Q. Do you recognize it? 8 A. I do. 9 MS. ZADRA-SYMES: Just for the record, the 10 title of the document is "The metal-free practice scam." 11 BY MS. ZADRA-SYMES: 12 Q. Do you see that? 13 A. Yes. 14 Q. Is this a document that you reviewed in 15 connection with preparing your report? 16 A. Yes. 17 Q. On the second page in the second full 18 paragraph, can you read that for me, please, the 19 paragraph beginning with "now"? 20 A. "Now, with the advent of full zirconia crowns 21 such as Zir-MAX by Burbank Dental Labs and Opalite by 22 Aurum Ceramics Labs, we are getting strength and some	1 A. Okay. I'm going to read it. 2 Okay. I've read it. 3 Q. Is there any reference to Glidewell? 4 A. No. 5 Q. Do you know if the two labs referenced in the 6 paragraph that I directed your attention to are 7 authorized Glidewell labs? 8 A. Not off the top of my head. I'd have to go 9 back and check on the list. 10 Q. Did you check that when you prepared your 11 report? 12 A. I don't recall if we checked it with this 13 particular document or not. As you know, we gave you 14 three binders of documents with thousands of pages, so 15 I'd have to go back and look. 16 Q. Actually, we didn't receive binders. We 17 just -- 18 A. Oh, you just received the drop-box electronic 19 delivery. My apologies for stating it that way then. 20 MS. ZADRA-SYMES: I've handed you what the 21 court reporter has marked as Exhibit 86, which again is 22 another document that we received from you on the
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1 beautiful translucency to match some of the all-ceramic 2 crowns." 3 Q. Is the Glidewell BruxZir product referenced 4 anywhere in this article? 5 A. I would have to read the whole article to 6 answer that question. 7 Q. Do you know why you produced this document to 8 us? 9 A. I think it came up in response to one of our 10 searching or digging down in one of our searches, 11 uh-huh. 12 I should note that the paragraph you had me 13 read is using the "full zirconia crowns" as a generic 14 term. Wouldn't you agree? 15 Q. I don't need to testify today. 16 A. I know you don't, but it is. 17 Q. But the Glidewell product is not mentioned in 18 this article, is it? 19 A. I would have to look and see. 20 Q. Okay. Well, take your time? 21 A. Would you like me to look? 22 Q. Yes, please.	1 production that we received on Wednesday evening this 2 week. 3 (Whereupon, Exhibit 86 was marked 4 for identification.) 5 MS. ZADRA-SYMES: The first page of the 6 document is titled "Proven winners," and it's a printout 7 from the website dentaleconomics.com. 8 THE WITNESS: Yes? 9 BY MS. ZADRA-SYMES: 10 Q. The first paragraph that's numbered, paragraph 11 No. 1 says "Full zirconia crowns." 12 A. Yes. 13 Q. And, again, in the middle of that paragraph, it 14 says, "The biggest challenge with full zirconia has been 15 esthetics, but this has been solved with such full 16 zirconia crowns as Zir-MAX (Burbank Dental Lab) and 17 Opalite (Aurum Ceramics)." 18 Do you see that? 19 A. Yes. 20 Q. Did you review this document in connection with 21 your report? 22 A. I believe so.
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1 Q. Did you check to see whether those companies 2 were authorized Glidewell labs?  3 A. Again, I don't recall specifically, although I 4 have a vague recollection that Zir-MAX may not be, in 5 particular, a Glidewell-authorized lab. I would want to 6 double-check that, but I think it's not, Zir-MAX.  7 I would note again, they're using "full 8 zirconia crowns" as the generic name for these crowns, 9 and they don't seem to feel any need to refer to them as 10 BruxZir crowns.  11 Q. You haven't looked at their website, have you? 12 A. Oh, I think we have, yeah. I meant in this 13 particular document which you're showing me.  14 MS. ZADRA-SYMES: This again is another 15 document that was produced to us on Wednesday evening.  16 (Whereupon, Exhibit 87 was marked 17 for identification.) 18 BY MS. ZADRA-SYMES:  19 Q. At the bottom of the page there's a reference 20 to zirconia-based and full-zirconia restorations. 21 A. Uh-huh. 22 Q. In the third sentence it says, "They are	1 Q. Turning back to your report on page 13, 2 paragraph 16. 3 A. Give me a moment, please, and I'll find it. 4 Yes. 5 Q. In the middle of the paragraph you say, 6 "Plaintiff's mark is a composite of the root prefix 7 'brux' and the root prefix 'zir.' 'Brux' is taken from 8 'bruxism,' and 'zir' is taken from 'zirconium.'" 9 A. Yes. 10 Q. "Dentists familiar with Plaintiff's services 11 and products would likely predominantly perceive its 12 marks BruxZir as a combination of these two roots 'brux' 13 and 'zir' because it involves the use of solid zirconia 14 to treat the results of teeth that have been ground by 15 bruxism."  16 Do you see that? 17 A. I do. 18 Q. Did you do any analysis of how dentists 19 perceive the term "zir," z-i-r? 20 A. I talked to Mr. Shuck about this, and I talked 21 to him about the history of how this mark was formed and 22 why it is formed the way it is and how the word "zir"
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1 rapidly becoming one of the most used types of 2 tooth-colored indirect restorations for both single and 3 multiple tooth indications. Because of their high 4 strength, full-zirconia restorations may be cemented 5 with any cement of the practitioner's choice."  6 Do you see that? 7 A. Yes. 8 Q. Is there a reference to Glidewell in this 9 document? 10 A. May I take a moment to look? 11 Q. Yes, of course. 12 A. Not that I see. 13 Did you hear my answer? 14 Q. Yes, thank you. 15 Two minutes. I just have to pull some other 16 documents. I'm going through them as quickly as I can. 17 THE VIDEOGRAPHER: Off the record at 1:57 p.m. 18 (Recess taken.) 19 THE VIDEOGRAPHER: Back on the record 20 at 2:05 p.m. 22 BY MS. ZADRA-SYMES:	1 came to be used in this mark, including in connection 2 with some early meetings with dentists. I also ran 3 "zir" in a search through the U.S. database to see what 4 it came up in connection with. 5 Q. And from that you determined that dentists 6 would likely predominantly perceive the mark "BruxZir" 7 as a combination of those two roots; is that correct? 8 A. Yes. 9 Q. So your understanding is the reference "zir" 10 will be perceived by dentists as a reference to 11 zirconium? 12 A. Predominantly. 13 Q. What is the date in this case for determining 14 when Glidewell's mark is a strong mark in the legal sense? 16 A. The date for determining whether Glidewell's mark is a strong mark in the legal sense would arguably be the same date as used in determining your client's entry into the market, which is the day for determining whether Glidewell's BruxZir mark was or was not generic at that time. So I believe that's August 2011. 22 Q. I believe it's actually May 2011, but we can
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<p>1 check. I'm not testifying.</p> <p>2 On page 14 of your report --</p> <p>3 A. Yes?</p> <p>4 Q. -- you say in paragraph 21 toward the end of</p> <p>5 the paragraph, the last two sentences, "This is not a</p> <p>6 crowded field in which several companies are using a</p> <p>7 mark similar to BruxZir to sell similar products or</p> <p>8 services. A mark that has relatively unique linguistic</p> <p>9 recognition in a given field is a strong mark."</p> <p>10 What's your basis for that?</p> <p>11 A. Well, the USPTO's trademark website and Google</p> <p>12 searches I did are reported earlier in this report, and</p> <p>13 my discussions with Mr. Shuck to see who besides the</p> <p>14 Plaintiff and the Defendant in this case use any mark</p> <p>15 that is similar to "BruxZir" or "bruxer" as a trademark</p> <p>16 for these two types of products or services, either the</p> <p>17 making of the crowns, the crowns, or the making of the</p> <p>18 blank material.</p> <p>19 Q. Anything else?</p> <p>20 A. No.</p> <p>21 Q. What do you mean by "relatively unique"</p> <p>22 linguistic recognition?"</p>	<p>1 a wide-scale sense, then it would be perhaps fanciful.</p> <p>2 But it's not really fanciful. It's a word that exists</p> <p>3 in the English language that was slightly misspelled and</p> <p>4 then arbitrarily applied to a field which is largely</p> <p>5 remote from the meaning of the numerical word.</p> <p>6 Now, an argument could be made, being a</p> <p>7 professor, that it's a suggestive mark because it</p> <p>8 suggests -- this is what the founder of Google said in a</p> <p>9 newspaper interview. He said, "We picked the mark to</p> <p>10 suggest the connection between the viewer of the number,</p> <p>11 which has all these zeros after it, the way the number</p> <p>12 would appear if it were written out, and the word</p> <p>13 'googol' that simplifies the number. And so we were</p> <p>14 trying to say, we simplify the massive data on the</p> <p>15 Internet in the way that word simplifies that number,"</p> <p>16 which is a very tortured and math geek explanation. To</p> <p>17 mathematicians I would say it would suggest it; to the</p> <p>18 general population, I don't think they would have gotten</p> <p>19 that.</p> <p>20 Q. And the question of suggestiveness is</p> <p>21 determined according to what the relevant consuming</p> <p>22 public understands?</p>
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<p>1 A. Well, I mean a mark that is linguistically</p> <p>2 unique or relatively unique tends to be stronger in its</p> <p>3 given field. For example, Google is the only</p> <p>4 search engine that sounds like "Google." If there were</p> <p>5 13 search engines that sounded like goog-something, then</p> <p>6 Google wouldn't be relatively linguistically unique in</p> <p>7 the search engine services market as a mark.</p> <p>8 So there are other areas where you find marks</p> <p>9 that are not relatively linguistically unique, where</p> <p>10 lots of competitors use the same mark or very similar</p> <p>11 marks to each other to sell very similar products, and</p> <p>12 in that sense you would say it's not a very unique mark.</p> <p>13 Q. Is Google a suggestive mark?</p> <p>14 A. Google is a misspelling of the word "googol,"</p> <p>15 which is a mathematical term that refers to a very large</p> <p>16 number. I forgot what the number is, but it's like 10</p> <p>17 with a hundred zeros after it. "Google" is probably</p> <p>18 perceived by the public as arbitrary or even fanciful.</p> <p>19 Most the time when I ask my students if they</p> <p>20 know what Google is, they don't even know what it is for</p> <p>21 the number, and they assume Google just invented this</p> <p>22 mark. If that were proven to be the case in a survey in</p>	<p>1 A. Absolutely, yes. To the perception of the</p> <p>2 relevant public.</p> <p>3 Let me just add though, by the way, with</p> <p>4 genericness --</p> <p>5 Q. I haven't asked a question about genericness.</p> <p>6 A. Well, shall I wait?</p> <p>7 Q. Yes, you shall.</p> <p>8 A. Will you ask me?</p> <p>9 Q. I asked whether Google was suggestive, and I</p> <p>10 had a very long answer. Thank you very much.</p> <p>11 A. I apologize for the very long answer. It's not</p> <p>12 clear. I would suspect it's not, but an argument could</p> <p>13 be made that it is.</p> <p>14 Q. Is it your opinion that because Glidewell is a</p> <p>15 market leader, other companies cannot use a generic term</p> <p>16 in the names of their products?</p> <p>17 A. I don't think I've said that.</p> <p>18 Q. So that's not your opinion?</p> <p>19 A. What other companies? What generic terms? In</p> <p>20 the names of what products? The question is entirely</p> <p>21 nonspecific to this case.</p> <p>22 Q. In your report, paragraph 23 --</p>
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1 A. Yes? 2 Q. -- you say, "As stated above, Glidewell is the 3 market leader in the provision of custom-made solid 4 zirconia crowns. A review of Keating's website reveals 5 that it is in the same market." 6 A. Yes. 7 Q. So is it your opinion that because Glidewell is 8 the market leader in the provision of custom-made solid 9 zirconia crowns, Keating cannot use a generic term in 10 the name of its products? 11 A. I'm not saying that there, and that's not the 12 opinion I'm stating there. The opinion I'm stating 13 there is that they're in the same market. 14 Q. Okay. So is it your opinion that Keating 15 Dental can use a generic term "bruxer" in the name of 16 its product? 17 A. Oh, "bruxer"? 18 Q. Which is admittedly a generic term in this 19 case. 20 A. Who admitted it? 21 Q. Glidewell. 22 A. Well, I would want to look at how it's being	1 A. The law is that if you want to take advantage 2 of descriptive fair use, you don't use it as a brand 3 name, and Keating is using it as a brand name. 4 Q. Are you saying that people don't use 5 descriptive terms in their trademarks? 6 A. One they do, they're no longer considered to be 7 using them descriptively. They're considered to be 8 using them as source identifiers. 9 Q. And if somebody disclaims the use of a term in 10 their trademark, would that indicate that it's 11 descriptive? 12 A. I saw that they disclaimed the use of it, and 13 that -- could be a lot of reasons for that, but that 14 doesn't mean that it's not still part of the composite 15 mark for which they were seeking protection. 16 Q. So are you saying that when somebody files a 17 trademark application that includes descriptive words, 18 they are necessarily claiming full trademark rights in 19 those descriptive words even if they disclaim them? 20 A. No. 21 Q. So it is possible to use a descriptive term in 22 a trademark without it being used in a trademark sense?
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1 used and when it's being used. I didn't admit it in 2 this deposition. 3 Q. It's an admission in this case that the term 4 "bruxer" is generic for people who suffer from bruxism. 5 A. Oh, I see. Well, it's not necessarily being 6 used in a generic sense by Keating, even if it's a 7 generic word. "Apple" is generic for apples, but when 8 you stick it on a computer company, it's no longer 9 generic. "Bruxer" could be the generic name of a person 10 who bruxes, but unless Keating is selling those 11 people -- I don't think they have bruxers that you 12 order, you know, you say, "Send me a bruxer" -- then 13 they're not using it as a generic term. 14 Q. Are they using it descriptively? 15 A. I think that they're using it suggestively. 16 They can't be using it descriptively because they're 17 using it in their trademark. For descriptive fair use 18 you don't use it in your trademark. 19 Q. That's your opinion, that it's not possible to 20 do? 21 A. That's the law. 22 Q. Okay.	1 A. I think it's theoretically possible. I don't 2 know that Keating is using it in a descriptive sense in 3 its trademark. 4 Q. But you haven't spoken to any dentist to 5 determine how they perceived that use? 6 A. We've already established, Ms. Symes, that I 7 have not spoken to any dentists about anything other 8 than my own teeth and my own bruxer crown. 9 MS. ZADRA-SYMES: Let's just take five minutes. 10 We're getting close to the end, so... 11 THE VIDEOGRAPHER: Off the record at 2:19 p.m. 12 (Recess taken.) 13 THE VIDEOGRAPHER: Back on the record at 14 2:26 p.m. 15 BY MS. ZADRA-SYMES: 16 Q. In connection with your report in this case, 17 have you done any studies to determine how a dentist 18 perceives the letter Z in connection with marks for 19 zirconia crowns? 20 A. Not other than what I've stated in the report 21 and what I've told you previously. 22 Q. Okay. In paragraph 24 of your report --
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1 A. Yes?	1 extra copies of it. I'm just pulling out a couple of
2 Q. -- towards the top of the page, you have a	2 pages here. It was printed on, according to the report
3 sentence that says, "By adding a Z, the Keating mark	3 that we received, October 9, 2012.
4 causes a mental association with the Z in Glidewell's	4 MR. TACHNER: That's probably the date you
5 BruxZir mark."	5 downloaded it and printed it.
6 A. Yes.	6 MS. ZADRA-SYMESES: It was the date it was given
7 Q. What's your basis for that statement?	7 to us.
8 A. Well, the Z is a prominent part in the BruxZir	8 MR. TACHNER: Well, we gave it to you
9 mark. It's capitalized, and it makes a distinct visual	9 electronically. It wasn't printed.
10 impression on the person who sees it. It's my	10 MS. ZADRA-SYMESES: Oh, I know you gave it to us
11 understanding that Keating's name is -- or was Keating	11 electronically, but I'm telling you when it was printed.
12 Dental Arts. I would have expected them to call their	12 We printed it when we received it.
13 product, therefore, if they were seeking to abbreviate	13 MR. TACHNER: All right.
14 their name, Keating KDA Bruxer, B-r-u-x-e-r, if they	14 MS. ZADRA-SYMESES: I'm trying to find -- there's
15 were going to go down that route, but instead they	15 no Bates numbers on anything, so I pulled out one of the
16 called it KDZ Bruxer.	16 marks here from the TESS report, and it's for Zira,
17 Q. So --	17 Z-i-r-a, full-contour zirconia. We could maybe make
18 A. It seems to me that once they add the Z to the	18 that one as an exhibit, and then I will make copies of
19 list of alphabetical symbols that precede the rest of	19 it afterwards. I'll just show you that one for now.
20 the mark, they attempt to call attention to it in a way	20 (Whereupon, Exhibit 88 was marked
21 that could very well cause confusion with Glidewell's	21 for identification.)
22 mark and which could very well trade on the goodwill and	22 THE WITNESS: Can I look at it?
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1 fame of Glidewell's BruxZir mark.	1 MS. ZADRA-SYMESES: Yes, surely. This is it.
2 Q. So when you reference mental association in	2 We've marked it as Exhibit 88, and again we're all
3 this sentence, you're talking about your own mental	3 sharing one copy.
4 association?	4 THE WITNESS: Yes, I'll hold it up like this,
5 A. No, I'm not.	5 if I can, if you can read it.
6 Q. But you --	6 BY MS. ZADRA-SYMESES:
7 A. Mental association, as you know, is often	7 Q. It's Zira, Z-i-r-a, full-contour zirconia, and
8 studied by way of inference in trademark cases, and many	8 you've previously testified today that "full-contour
9 judges with no survey evidence whatsoever accept	9 zirconia" is a generic term for crowns that include
10 testimony of and make statements about likely mental	10 zirconia; is that correct?
11 associations.	11 A. Yes.
12 Q. But you are aware that there are numerous	12 Q. Is that generic term referenced anywhere in the
13 trademarks in the dental industry that use a capital	13 description of goods for that mark?
14 letter Z in connection with a product that includes	14 A. Well, the word "zirconia" is.
15 zirconia?	15 I don't believe this is a registered mark. It
16 A. But not with "bruxer" in the trademark that I	16 says, "Published for opposition."
17 found. I found no other companies besides these two	17 Q. But the --
18 that combine "Z" and "bruxer" in any phonetic	18 MR. TACHNER: It's got a registration number.
19 pronunciation thereof as part of their trademark.	19 THE WITNESS: Where is the registration number?
20 Q. In the cert report that was produced to us on	20 MR. TACHNER: On the bottom.
21 Wednesday evening, which appears to be over a thousand	21 THE WITNESS: Oh, yeah, "Registration Number."
22 pages -- I have a copy in front of me, but I didn't make	22 I'm sorry. Yes, go ahead.
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1 So what's your question?	1 A. I think so, yes.
2 MS. ZADRA-SYMES: Can you read it back, please.	2 I'm not sure I said it in those words. I said
3 (Record read as follows:	3 "full zirconia crown" was. Let me just look at my
4 "Question: Is that generic term	4 report before I give you an answer that's not consistent
5 referenced anywhere in the description	5 with what in fact I did say before.
6 of goods for that mark?"	6 Would you let me do that for a moment?
7 THE WITNESS: Part of it is.	7 Q. Of course.
8 BY MS. ZADRA-SYMES:	8 A. Do you want to repeat your question?
9 Q. The word "zirconia"?	9 Q. The question was, is it your opinion that the
10 A. Yes.	10 term "full zirconia" is a generic term in connection
11 Q. Okay. Can you pass that back, please.	11 with dental appliances that include zirconia?
12 A. Sure.	12 A. It may be.
13 Q. And you'll see on the back page --	13 Q. Okay. And what I've handed you is one of the
14 A. Oh, I didn't look at the back page.	14 pages from your TESS printout, and that is firm mark
15 Yes.	15 called Suntech full zirconia.
16 Q. -- that there's a disclaimer.	16 A. Yes.
17 A. I do see that.	17 Q. It does not appear to be registered --
18 Q. And what does that indicate?	18 A. Correct.
19 A. "No claim is made to the exclusive right to use	19 Q. -- but there is a disclaimer on the back --
20 'full-contour zirconia' apart from the mark as shown."	20 A. Yes.
21 Q. Why is that disclaimer made?	21 Q. -- of "full-contour."
22 A. So that they can't sue somebody else who uses	22 A. No.
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1 the term "full-contour zirconia."	1 Q. Sorry.
2 Q. So what's the trademark here in this?	2 A. "Full zirconia."
3 A. It's the whole thing.	3 Q. "Full zirconia."
4 Q. Okay.	4 A. Would you like me to read it?
5 A. That disclaimer doesn't take that out of the	5 Q. Yes, please.
6 trademark. It just qualifies their rights.	6 A. "No claim is made to the exclusive right to use
7 Q. It also indicates that other people can use	7 'full zirconia' apart from the mark as shown."
8 those disclaimed terms in their marks too?	8 Q. So that would be an indication that the company
9 A. Separately, in a nonconfusing way.	9 is not claiming rights in the words "full zirconia"?
10 Q. And also in other trademarks?	10 A. Standing alone.
11 A. Yes.	11 Q. Standing alone?
12 MS. ZADRA-SYMES: Here's another one. I'm	12 A. Only in connection with the word "Suntech"
13 going to hand you what the court reporter has marked as	13 coming before it.
14 Exhibit 89. It is a printout of the TESS report that	14 Q. Yes. Thank you.
15 you produced to us referencing the Suntech full zirconia	15 The description of goods in that application,
16 trademark.	16 does it reference "full zirconia"?
17 (Whereupon, Exhibit 89 was marked	17 A. It does not.
18 for identification.)	18 Q. Do you know how dentists order dental crowns
19 BY MS. ZADRA-SYMES:	19 from a dental lab?
20 Q. And again, you testified earlier today that	20 A. They fill out a form, and they check off what
21 "full zirconia" was a generic name; is that correct?	21 they want. I suppose it varies from lab to lab. I've
22 "Full zirconia crown"?	22 seen some of the forms produced in this litigation by
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<p>1 your client which indicate how they order.</p> <p>2 Q. Does that form have the Keating Dental</p> <p>3 Associates [sic] name at the top?</p> <p>4 A. I believe so.</p> <p>5 Q. We already established that you didn't have any</p> <p>6 discussions with any dentists, so if a dentist was very</p> <p>7 well aware that it was purchasing a product from Keating</p> <p>8 Dental Associates and not from Glidewell, would that</p> <p>9 indicate that the dentist was confused?</p> <p>10 A. Is that a hypothetical question?</p> <p>11 Q. Yes.</p> <p>12 A. If the dentist was aware that it was purchasing</p> <p>13 a product from Keating and not from Glidewell, would it</p> <p>14 indicate that the dentist was confused about what?</p> <p>15 Q. About the source of the product it was</p> <p>16 purchasing.</p> <p>17 A. It could still indicate confusion as to source.</p> <p>18 Q. And how would it do that?</p> <p>19 A. The dentist might not know that -- well, in my</p> <p>20 understanding, Keating Dental Arts does not sell blanks;</p> <p>21 correct? It's correct. They sell finished crowns. If</p> <p>22 the dentist is looking for a finished crown, he or she</p>	<p>1 that inference is reasonable given that evidence; that a</p> <p>2 court of law would like at that as prima facia evidence</p> <p>3 of actual confusion, or could.</p> <p>4 Q. But if a dentist was aware that the product did</p> <p>5 not come from Glidewell and that the material for making</p> <p>6 the crown did not come from Glidewell, would they still</p> <p>7 be confused?</p> <p>8 A. You mean that the material was not real BruxZir</p> <p>9 material from Glidewell?</p> <p>10 Q. From Glidewell, exactly.</p> <p>11 A. I would think not. I would think in those</p> <p>12 circumstances, they would not be confused.</p> <p>13 Q. Who are Glidewell's major competitors?</p> <p>14 A. Well, I think it depends on whether you're</p> <p>15 talking about for the blanks or for the labs. Let's</p> <p>16 start with the blanks. Who makes this strength of --</p> <p>17 who makes this strength? I did get this information. I</p> <p>18 specifically asked Mr. Shuck for this information, and</p> <p>19 I'm trying to see if I can remember the names of some of</p> <p>20 these competitors.</p> <p>21 I think Zir-MAX is a competitor. I think</p> <p>22 Zir-Cast is a competitor. I think Lava Plus is a</p>
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<p>1 could think that Keating is an authorized lab selling</p> <p>2 authorized BruxZir material in its crowns. So the mere</p> <p>3 fact that the dentist knows it's dealing with a lab</p> <p>4 doesn't mean that the dentist knows it's not getting a</p> <p>5 real BruxZir crown.</p> <p>6 Q. Is it your understanding that the only zirconia</p> <p>7 material available for making full zirconia crowns comes</p> <p>8 from Glidewell?</p> <p>9 A. No.</p> <p>10 Q. Is it your understanding that the only material</p> <p>11 for making full zirconia crowns for bruxers comes from</p> <p>12 Glidewell?</p> <p>13 A. No. There could still be confusion because</p> <p>14 they could think it was Glidewell's?</p> <p>15 Q. You haven't asked any of them though, have you?</p> <p>16 A. I've seen evidence in your order forms of them</p> <p>17 writing "BruxZir" with a capital Z, which seems to</p> <p>18 indicate at least the inference that some of them could</p> <p>19 very well have believed that that was authorized</p> <p>20 Glidewell BruxZir material used.</p> <p>21 Q. But you've made that assumption?</p> <p>22 A. I haven't made that assumption. I have said</p>	<p>1 competitor; I think it's made by 3M, and they make the</p> <p>2 blanks, Lava Plus. I think NexxZr, spelled</p> <p>3 N-e-x-Z-r [sic], may make the blanks as well.</p> <p>4 Those are some of the names I recall being</p> <p>5 given on Glidewell competitors for the material.</p> <p>6 Q. And then for the actual crowns?</p> <p>7 A. Well, the crowns is almost too numerous to</p> <p>8 mention because the crowns are made by unauthorized --</p> <p>9 well, independent -- let's just say unassociated,</p> <p>10 unaffiliated dental labs throughout the United States,</p> <p>11 of which there are many. Many, many, many.</p> <p>12 It is my understanding that Glidewell is the</p> <p>13 largest single lab. I do not know who the second- and</p> <p>14 third-largest single labs are for making the crowns.</p> <p>15 Q. And do you know when the many independent labs</p> <p>16 began making those crowns?</p> <p>17 A. I don't know the precise dates. I know that --</p> <p>18 or I've been told that full zirconia crowns were not</p> <p>19 widely made and sold throughout the United States before</p> <p>20 Glidewell's marketing and promotion of them increased in</p> <p>21 the overall sales of them.</p> <p>22 Q. So have you determined since June of 2009 how</p>
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<p>1 many of these many independent labs began making full 2 zirconia crowns since 2009?</p> <p>3 A. I don't have a precise number, no.</p> <p>4 Q. Are you aware of any instances where a customer 5 has ordered a KDZ Bruxer product from Glidewell?</p> <p>6 A. No, not off the top of my head. I'm aware of 7 the opposite. I believe you produced instances of 8 50 orders of BruxZir products from Keating.</p> <p>9 Q. That's what you're saying they are, but...</p> <p>10 A. Well, it says it on there with a Z.</p> <p>11 Q. Then are you aware of any customer making any 12 inquiries with Glidewell to order a KDZ Bruxer product?</p> <p>13 A. No.</p> <p>14 Q. Are you aware of any instances where a 15 KDZ Bruxer product has been returned to Glidewell?</p> <p>16 A. No, I'm not aware of any.</p> <p>17 MS. ZADRA-SYMES: If we take another short 18 break, I think we're getting close to done.</p> <p>19 THE WITNESS: Okay.</p> <p>20 THE VIDEOGRAPHER: Off the record at 2:48 p.m. (Recess taken.)</p> <p>22 THE VIDEOGRAPHER: Back on the record</p>	<p>1 THE WITNESS: Yes.</p> <p>2 MS. ZADRA-SYMES: At the top it says "CDL 3 Veneers - Products - ZerisBRUX," Z-e-r-i-s-B-R-U-X, and 4 then there's a photograph of a lady towards the middle 5 of the page. Next to that it says ZerisBRUX with a 6 circle R, and underneath it says "Full-Contour Zirconia 7 Restorations."</p> <p>8 BY MS. ZADRA-SYMES:</p> <p>9 Q. Do you see that?</p> <p>10 A. I do.</p> <p>11 Q. Are you familiar with this product?</p> <p>12 A. No.</p> <p>13 Q. Is this an attempt to trade on the Glidewell mark?</p> <p>15 A. I don't know. I haven't done an investigation of this.</p> <p>17 Q. Based on what you see on this website printout, would you infer that it is an attempt --</p> <p>19 A. They're not using the word "bruxer," and "Zeris" is fairly distinct. I don't know. I'm not here to make a trademark analysis of whether Glidewell would have a claim against these people and, if so, what would</p>
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<p>1 at 2:55 p.m.</p> <p>2 MS. ZADRA-SYMES: I handed you what the 3 court reporter has marked as Exhibit 90 and Exhibit 91. (Whereupon, Exhibit 90 was marked 5 for identification.) (Whereupon, Exhibit 91 was marked 7 for identification.)</p> <p>8 MS. ZADRA-SYMES: So turning first to 9 Exhibit 90, this is a document that we produced. It 10 doesn't have a Bates number at the bottom.</p> <p>11 MR. MANGUM: We haven't produced it yet.</p> <p>12 MS. ZADRA-SYMES: Oh, so it will be produced.</p> <p>13 THE WITNESS: It's not yet been produced in 14 this litigation?</p> <p>15 MS. ZADRA-SYMES: No, it has not been produced 16 yet. No. But it will be.</p> <p>17 THE WITNESS: So I'm the first person to see 18 it?</p> <p>19 MS. ZADRA-SYMES: You may very well be.</p> <p>20 THE WITNESS: I'm honored.</p> <p>21 MS. ZADRA-SYMES: It's a printout from 22 www.cdlab.com.</p>	<p>1 be the strengths and weaknesses up one side and down the 2 other and all the arguments that could be made by both 3 sides and whether this could create a likelihood of 4 confusion in the relevant marketplace. I would really 5 have to make a much greater investigation to give you a 6 meaningful opinion.</p> <p>7 Q. You do agree that this has a capital Z at the 8 beginning of the mark; is that correct?</p> <p>9 A. It does, yes. I think my testimony earlier was 10 that there was no mark that had "bruxer" and a Z other 11 than your client's and Glidewell's.</p> <p>12 Q. But this has a capital Z and the word "brux"?</p> <p>13 A. Yes, but not "bruxer."</p> <p>14 Q. Okay.</p> <p>15 A. Well, "bruxer" is a lot like "BruxZir" in the 16 sense that it's two syllables; this is one syllable.</p> <p>17 Q. How many --</p> <p>18 A. You know, it's possible that people -- other 19 people trade on other people's goodwill, and that 20 doesn't mean that somehow it absolves your client from liability, nor am I here --</p> <p>22 Q. That wasn't my question.</p>
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1 A. I know that, but nor am I here to give 2 thorough, you know, reviews of the potential trademark 3 claims and defenses of every single thing that you can 4 find with the word "brux" on the Internet.  5 Q. But you have prepared a report that purports to 6 have done an investigation of the products that are in 7 the marketplace, and this is one of the products in the 8 marketplace, so that's why I put it in front of you.  9 A. I appreciate that, and I -- 10 Q. Okay. So we can turn to Exhibit 91 now. 11 A. Okay. 12 Q. This is a document that has been produced. 13 It's numbered KDA-002172. 14 A. Yes. 15 Q. And there's a reference in two places to a -- 16 the first reference, slightly more than halfway down the 17 page, says "Posterior Single Units." 18 A. Uh-huh. 19 Q. It says, Use Procera Zirconia or Bruxer crown 20 made from IPS e.max." 21 Do you see that? 22 A. Yes, I do.	1 Mr. Tachner, to whom I put several questions that I 2 wanted asked of Mr. Shuck. 3 Q. So other than speaking with Mr. Tachner, you 4 didn't have any other contact with anybody at Glidewell 5 prior to preparing your report? 6 A. Correct. 7 MS. ZADRA-SYMES: I think that I don't have any 8 questions today, but as we've discussed, we reserve the 9 right to continue this deposition because of the 10 apparent missing documents or documents that may be 11 missing that the witness has relied upon for his report, 12 and also because of the volume of the documents that we 13 only received on Wednesday evening despite requests that 14 they be produced earlier and despite the federal rules 15 obligation. 16 MR. TACHNER: I don't recall ever getting a 17 request that they be produced earlier than Wednesday. 18 The first time you asked for them was when I got an 19 e-mail from either Rustin or David saying, "Please 20 produce these by Wednesday." 21 MS. ZADRA-SYMES: Because they hadn't been 22 produced pursuant to the obligations under the federal
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1 Q. Is that a Glidewell-authorized company? 2 A. I don't know. 3 Q. And then there's another reference to the same 4 product further down, "Use IPS e.max Bruxer crown." 5 A. I see that. 6 Q. Okay. So in your research regarding the 7 marketplace you didn't come across this product? 8 A. No. 9 Q. You mentioned that the only person that you've 10 met with at Glidewell was Jim Shuck? 11 A. Yes. 12 Q. How many meetings have you had with Jim Shuck? 13 A. One. 14 Q. When was that? 15 A. Within the last week. 16 Q. So had you spoken with Mr. Shuck by telephone 17 prior to that meeting? 18 A. No. 19 Q. So prior to preparing your report, which was 20 signed on September 15, did you have any discussions 21 with Jim Shuck? 22 A. I don't think so. I think I spoke with	1 rules. You didn't ask us to produce our expert 2 exhibits; we just did because that's the federal rule 3 obligation. 4 MR. TACHNER: Your expert's what? 5 MS. ZADRA-SYMES: Documentation that he relied 6 upon in connection with his report. 7 So with that reservation, I'm going to finish 8 my questions for today. 9 MR. TACHNER: Okay. I have no questions. 10 MS. ZADRA-SYMES: Thank you. 11 THE VIDEOGRAPHER: All right. Off the record 12 at 3:02 p.m. (At 3:02 p.m., the deposition of DAVID J. FRANKLYN was adjourned.)
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1 STATE OF CALIFORNIA ) 2 COUNTY OF LOS ANGELES ) SS. 3 4 I, AUDRA E. CRAMER, CSR No. 9901, in and for the State of California, do hereby certify: 5 That, prior to being examined, the witness named in the foregoing deposition was by me duly sworn to 6 testify the truth, the whole truth and nothing but the truth; 7 That said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction, and the same is a true, correct and complete transcript of said proceedings; 8 I further certify that I am not interested in the event of the action. 9 Witness my hand this 31st day of October, 10 2012. 11 12 13 14 15 16 17 18 Certified Shorthand 19 Reporter for the 20 State of California 21 22	1 Digital Evidence Group, L.L.C. 2 1726 M Street NW, Suite 1010 3 Washington, D.C. 20036 4 (202) 232-0646 5 6 SIGNATURE PAGE 7 8 Case: James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc 9 Witness Name: David J. Franklyn Deposition Date: October 12, 2012 10 11 I do hereby acknowledge that I have read and examined the foregoing pages of the transcript of my deposition and that: 12 13 (Check appropriate box): 14 ( ) The same is a true, correct and complete transcription of the answers given by me to the questions therein recorded. 15 ( ) Except for the changes noted in the attached Errata Sheet, the same is a true, correct and complete transcription of the answers given by me to the questions therein recorded. 16 17 18 19 20 21 22 DATE WITNESS SIGNATURE	Page 154 Page 156
1 David J. Franklyn c/o 2 Leonard Tachner PLC 17961 Sky Park Circle, Suite 38-E 3 Irvine, CA 92614-6364 4 5 Case: James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. 6 Date of deposition: October 12, 2012 7 Deponent: David J. Franklyn 8 Please be advised that the transcript in the above 9 referenced matter is now complete and ready for signature. 10 The deponent may come to this office to sign the transcript, 11 a copy may be purchased for the witness to review and sign, or the deponent and/or counsel may waive the option of signing. 12 Please advise us of the option selected. 13 Please forward the errata sheet and the original signed signature page to counsel noticing the deposition, noting the applicable time period allowed for such by the governing Rules of Procedure. 14 If you have any questions, please do not hesitate to call our office at 15 (202)-232-0646. 16 17 Sincerely, 18 19 20 Digital Evidence Group 21 Copyright 2012 Digital Evidence Group 22 Copying is forbidden, including electronically, absent express written consent.	1 Digital Evidence Group, L.L.C. 2 1726 M Street NW, Suite 1010 3 Washington, D.C. 20036 4 (202) 232-0646 5 6 7 Case: James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc 8 Witness Name: David J. Franklyn 9 Deposition Date: October 12, 2012 10 Page No. Line No. Change 11 12 13 14 15 16 17 18 19 20 21 22 Signature Date	Page 157 Page 157

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1 STATE OF CALIFORNIA )  
2 COUNTY OF LOS ANGELES ) SS.  
3

4 I, AUDRA E. CRAMER, CSR No. 9901, in and for the  
State of California, do hereby certify:

5 That, prior to being examined, the witness named  
in the foregoing deposition was by me duly sworn to  
6 testify the truth, the whole truth and nothing but the  
truth;

7 That said deposition was taken down by me in  
shorthand at the time and place therein named, and  
8 thereafter reduced to typewriting under my direction,  
and the same is a true, correct and complete transcript  
9 of said proceedings;

I further certify that I am not interested in the  
10 event of the action.

11 Witness my hand this 31st day of October,  
12 2012.

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Certified Shorthand  
Reporter for the  
State of California